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CURRENT EVENTS.

INDEPENDENCE OF THE JUDICIARY—"THE CALIFORNIA PLAN."—A question which will interest the legal profession every where is pending in the California Legislature now convened in extra session. The Supreme Court of that State, on the 26 day of April 1886, rendered a decision in the case of Lux v. Huggin involving the subject of Eminent Domain, and connected therewith, important riparian and water rights, and seriously affecting the whole irrigation system of the State. The malcontent interest in the community had sufficient influence with the Governor to induce him to convoke the legislature in extra session, not, as might well be supposed at this distance, to limit or define the law of eminent domain, or to revise and amend the irrigation and other water laws of the State, but to re-organize the Supreme Court, for the purpose, avowed without paraphrase or circumlocution, of repealing out of office the judges who concurred in the ruling in Lux v. Haggin, and replacing them with judges who will reverse that ruling, and hereafter administer the law in accordance with the views of those at whose instance the Governor has taken this remarkable step.

The Bar Association of California naturally takes much interest in these proceedings, and has adopted a memorial to the legislature protesting in the strongest terms against the proposed action. These gentlemen very properly ignore the Lux v. Haggin case and all the Eminent Domain, water, and irrigation doctrines involved in it, and put their opposition to the proposed measure upon the higher ground that the Judiciary of a State is a co-ordinate branch of the government of the State, equal in dignity, and importance to the Executive or Legislative branch; that its independence is one of the chief safeguards of the rights of the people, and especially of the minority, and that irrespective of all reference to transitory emergencies, or temporary expediency it should be scrupulously preserved.

It does not appear by this memorial which is the only document on the subject now in our hands, whether an amendment of the constitution is proposed, or how otherwise the desired object is to be accomplished. The constitution of California provides for the removal of judges by a two thirds vote of both houses of the legislature, but this proceeding, like removal upon an address, is a penal and punitive process, equivalent to impeachment, and only applicable to "high crimes and misdemeanors." These Judges are not charged with any crime, on the contrary, the Executive Committee of the State Irrigation Convention, while actively agitating for the removal of the judges, says: "We do not in any way question the uprightness, integrity, or personal character in any respect of any of the Judges of that high tribunal." The only fault found with them is, that their opinions on certain points of law are very distasteful to those who seek their removal.

When, within living memory, a President of the United States in appointing Justices of the Supreme Court was said to have been controlled in his selection by the known opinions of the aspirants, on certain important legal questions, with a view to secure a decision in accord with the Presidential views, his action so prompted by these (alleged) motives was regarded by large classes of people, by no means political purists, as decidedly sharp practice and "against the rules of the game." The President however was only discharging an official duty, he displaced nobody, his action in no degree disorganized the Supreme Court, and whether his motive was to defeat the deliberate official action of a co-ordinate branch of the government, was at the time a partisan political question and is now a "dead issue."

In the case under consideration there is no "if" or "whether." The avowed purpose is to remove from office, Judges of the highest court of the State, who have been duly elected by the people, whose term of office, fixed by the constitution, has not expired, whose "uprightness, integrity and personal character" are conceded by their adversaries to be above suspicion, because, and only because they do not understand the law on certain points, as their adversaries understand it. This is the proposition, and we

must say that we can recall nothing like it in the history of any constitutional government. There is certainly no judicial parallel.

If this project shall be carried into effect, these Judges removed, others more complaisant put into their places, the dignity and independence of California Courts will have been extinguished, and the highest judges of the land reduced to the status of day laborers liable at any time to be paid up at sundown, and ordered off the premises.

We could not believe upon any authority less respectable than the California Bar Association that gentlemen, acting under the responsibilities of official station, could even contemplate so radical, revolutionary, and destructive a measure as the utter annihilation of the independence of the Judiciary of a State. That, because of their professional opinions, and official decisions in cases pending before them, judges should be asked by any responsible persons, to resign their officers is bad enough; but that judges of the highest court in the land, (or any other judges, for that matter) should on account of their opinions on legal questions be turned out, of office by the legislature upon the recommendation of the Governor, is simply incredible, and we will not believe that it can be done until it has been done. No consequences, however grave, of judicial decisions can justify such a measure. It would be better to resolve society into its original elements, call a convention, abrogate the existing constitution of the State as a failure, and frame a new one, taking care that it shall secure, beyond controversy, the independence of the judiciary as the surest and most effectual safeguard of all rights, public and private.

"I WILL"—A question that troubles young lawyers is, where to locate and what branch of practice to select. This puzzle lasts even into middle life with many able men, and some never solve it—life itself is an unsolved riddle.

Letters from Dakota, Oregon, Iowa, Georgia, and Arkansas, indicate a fast growing settlement in each locality, and where growth is rapid, young lawyers secure more chances of promotion, while in Eastern and Middle State, habits are fixed and titles are established, and older men do the leading business.

But there is a place for every one of genius and ability somewhere, and only let him say, *I will reach it*, and he is half to it already. Men live where their hopes are, and prosper when they *will* prosper. Men invent when they have courage to think out problems alone and advance them. The man who surrenders to a theory like this: I'm only a little moth around the candle of the earth, burning my wings with each flutter, and doomed to fall unknown and early into an unforgotten hereafter, is very likely to do so—he is halfway on the journey.

Men who have within them the *I will be a lawyer and a good one*, the *I will live happily, battle bravely*, the *I will succeed inwardly*, must make a bright mark some day, for such lives are never failures; they are heard of, marked, remembered. "Make up your mind to have a front seat in life, and you attract to you the powers that carry you to it."

Confidence in yourself, the "I will" is everything. Look at the leaders of great enterprises! They seem to care little for competition; most of them are sharpened by it. They aspire to be first, and the first is ever just ahead of them. They have already half reached it when once fairly started. *Think* to the front and you will get to the front; lag to the rear and it is ever ready for your coming.

Get out of the notion that the man who cites the most law and reads the most reports, is the best lawyer. No man carried less books to court than did Carpenter, but he carried his manhood there always, his clear insight was thought out by himself, and his facts applied to principles and results demanded. It is not the most learning but the best wisdom that wins. What a weak ambition one must have to spend a life-time in dreaming over the prospects of personal failure! Why not anticipate success and aim for it? The courage of the *I will lawyer* secures him, first standing room; next an opening, and then, early, a front seat in the ranks of his profession. If you never have set your heel down with emphasis, in an "I will" determination to win, the sooner this resolution is reached the nearer you will be to the goal of ambition. The hand is never strong

er than the heart, and the man is never greater than his mind. His life is below or above his true condition, very much as he wills it, and no one will cheer him till he wins something worthy of applause. The world is both stingy and liberal, reluctant to risk on uncertainty, and willing to advance thousands on ventures when successful. The demonstration of success is what they wait for and demand. J. W. DONOVAN.

NOTES OF RECENT DECISIONS.

CARRIER—NEGLIGENCE—POWER OF CARRIER TO STIPULATE FOR IMMUNITY FROM LIABILITY FOR INJURIES CAUSED BY NEGLIGENCE—LIMITATIONS OF THAT POWER—INFANCY—RESPONDEAT SUPERIOR.—In a recent case,[1] the Supreme Court of Connecticut had occasion to consider the question whether a carrier can contract for exemption from liability for negligence on his part; to what extent, and under what circumstances, such exemption may be obtained, and what degree of negligence, if any, is too gross to be waived by contract.

The facts were, that the plaintiff's intestate, a boy of seventeen years of age, had a free pass on defendant's railroad, being a train-boy who sold refreshments to passengers. The pass stipulated that the person accepting it assumed all the risk of accident, and that the company should not be liable in any event for any injury resulting from the negligence of its agents, or otherwise. The boy, while riding on a train under this pass, was killed, in consequence of a collision of the train with another train. He was not at the time in the exercise of his functions as train-boy.

The court, pretermitting all questions of contributory negligence, held: 1st, that the pass was granted without consideration, and was a gratuity; 2d, that the railroad company had a right, in cases of gratuity, to stipulate against liability for negligence of every grade and degree; 3rd, that the pass in question effectually excluded all liability for all negligence; and, 4th, that the exemption was in no degree impaired by the fact that the deceased was an infant under the age of twenty-one years.

The court says: "By the English decisions it is clear that the carrier has full power to provide by contract against all liability for negligence in such cases.[2] In the United States we find much contrariety of opinion. Some State courts of the highest authority follow the English decisions and allow railroad companies, in consideration of free passage, to contract for exemption from all liability for negligence of every degree, provided the exemption is clearly and explicitly stated.[3]

Other courts, also of high authority, concede the right to make such exemptions in all cases of ordinary negligence, but refuse to apply the principle in cases of gross negligence.[4] And other State courts of equal authority utterly deny the power to make a valid contract exempting the carrier from liability for any degree of negligence.[5]

The Supreme Court of the United States, in Railroad Company v. Lockwood,[6] where a drover had a free pass to accompany his cattle in their transportation, held, in opposition to the New York and English cases, that the pass was not gratuitous because given as one of the terms for carrying the cattle, for which he paid. The reasoning of Bradley, J., was directed so strongly to the disparagement of the New York decisions, that it might have indicated an opposition to the principle of those cases in other respects, had not the opinion concluded with this distinct disclaimer: 'We purposely abstain from expressing any opinion as to what would have been the result of our judgment had we considered the plaintiff a free passenger, instead of a passenger for

[1] Griswold v. New York etc. Co., S. C. Conn. 11 New ng. Rep. 315.

[2] McCawley v. Furness R. Co., L. R. 8 Q. B. 57; Hall v. N. E. R. Co., L. R. 10 Q. B. 437; Duff v. Great North. R. Co., 4 L. R. Ireland, 178; Alexander v. Toronto & Nipissing R. Co., 33 U. C. 474.

[3] Welles v. N. Y. C. R. R. Co., 26 Barb. 641; S. C. 24 N. Y. 181; Perkins v. N. Y. C. R. R. Co., Id. 208; Bissell v. N. Y. C. R. R. Co., 25 N. Y. 442; Poucher v. N. Y. C. R. R. Co., 49 N. Y. 263; Magnin v. Dinsmore, 56 N. Y. 168; Dorr v. N. J. Steam Nav. Co., 11 N. Y. 485; Kinney v. Central R. R. Co., 32 N. J. L. 409; S. C. 34 Id. 513; W. & A. R. R. Co. v. Bishop, 50 Ga. 465.

[4] Ill. Cent. R. R. Co. v. Read, 37 Ill. 484; Ind. Cent. R. Co. v. Mundy, 21 Ind. 48; Jacobus v. St. Paul & C. R. Co., 20 Minn. 125.

[5] Cleveland, etc. R. R. Co. v. Curran, 10 Ohio St. 1; Mobile & O. R. R. Co. v. Hopkins, 41 Ala. 486; Pa. R. R. Co. v. Henderson, 51 Pa. St. 315; Flinn v. Phila. W. & B. R. R. Co., 1 Houst. (Del.) 469.

[6] 17 Wall. 357 [84 U. S. bk. 21, L. ed. 627.]

hire.' The reasoning and the conclusions of the court, therefore, must be considered as all based on the assumption that the passenger paid for his passage.

The conclusions of the court were; '(1) That a common carrier cannot lawfully stipulate for exemption from responsibility, when such exemption is not just and reasonable in the eye of the law; (2) that it is not just and reasonable in the eye of the law for a common carrier to stipulate for exemption from responsibility, for negligence of himself or his servants.' "

Conceding that public policy forbids a contract by which a common carrier may escape responsibility to paying passengers for the negligence of its servants, the question remains: does the same rule apply to free passengers? In the case of paying passengers, it is said, the passenger and the carrier do not stand upon equal terms. He is but one man, the carrier is a powerful corporation. "He cannot," says the court, "higgle upon terms." More reasonably, we think, it might be said that, paying his money for his transportation he is entitled to every possible assurance that he is not paying his money for his own destruction. And public policy should forbid that he be permitted or compelled to bargain away any safeguard that the law affords him. With the paying passenger the transaction is business, a contract upon a valuable consideration; with the free passenger, it is a gift, without consideration, solicited by him and accorded *ex gratia* by the carrier. It seems hardly reasonable to require the latter to insure the life and limbs of the passenger, besides furnishing him with free transportation. The rule of *respondeat snperior*, which, in case of paying passengers, is, and should be, imperative, may well be waived in cases of free passengers. The donor annexes a condition to his gift, and the donee has the alternative of accepting it with the condition, or refusing it altogether. He may go free uninsured, or he may pay and go insured. There is neither hardship nor compulsion in this alternative, and public policy will not intervene in his behalf.

As to infancy, it is manifest that an infant has capacity in law to accept a gift, absolute or conditional. He cannot accept the gift and reject the condition if it is reasonable. And a condition of self-insurance is reasonable, unless he is of such tender years, or so infirm in body or mind, that it is unsafe for him to travel unattended. In such a case, the condition would be unreasonable and the carrier would be liable.

RIGHTS AND LIABILITIES OF SURETIES ON OFFICIAL BONDS.

The title chosen for this article is, perhaps, to some extent a *petitio principii*; for it assumes that bondsmen, or those who become securities on official bond, are sureties which is one of the propositions sought to be established. They are generally denominated sureties, although they are sometimes called sureties and sometimes called guarantors, both in the reports and in the text books. As the rules of law applicable to sureties and those applicable to guarantors are in some respects quite different, it is necessary to determine whether one who signs a bonds as security is a surety or a guarantor, before we can tell what are his rights and liabilities.

The distinction between a surety and a guarantor is very clearly drawn by Mr. Brandt in his work on Suretyship and Guaranty. "A surety," he says, "is usually bound with his principal by the same instrument, executed at the same time and on the same consideration. He is an original promisor and debtor from the beginning, and is held ordinarily to know every default of his principal. * * * On the other hand, the contract of the guarantor is his own separate undertaking, in which the principal does not join. It is usually entered into before or after that of the principal, and is often founded on a separate consideration from that supporting the contract of the principal." [1]

Now one who goes security on a bond is usually bound with his principal by the same instrument, executed at the same time and on the same consideration; and suits on bonds are usually brought against bondsmen and principal jointly, thus recognizing the fact that they are sureties rather than guarantors, for a

[1] Brandt on Suretyship and Guaranty. 1. See also to same effect; McMillan v. Bull's Head Bank, 32 Ind. 11; Kearnes v. Montgomery, 4 West Va. 29; Markland etc. Co. v. Kimmel, 87 Ind. 560, 566.

guarantor can not ordinarily be sued jointly with his principal.

There are few authorities directly in point, but in a late case,[2] not yet reported, the Supreme Court of Indiana, after a careful examination of the subject, stood equally divided, an opinion being filed on each side of the question. The case was a suit on cashier's bond in the ordinary form. The court, being equally divided, the judgment of the lower court, holding the bondsmen to be guarantors, was affirmed. The reasons for so holding are well and forcibly stated by Mitchell J., in the course of his opinion. "Whether the contract is entered into separately or jointly with the principal," he says, "if by its terms it appears that the principal is separately bound by an original independent contract, to which the contract for security is collateral, and the obligors agree therein that the principal will pay or perform, according to his original engagement, and that they will answer for his default, in the event of failure, they become guarantor. * * * In no event was it contemplated that they (the bondsmen) or either of them would discharge the duties of cashier, or do the particular things which he might fail to do. The fair import of their contract is, that they will pay any damages which may accrue on account of his default. This constitutes them guarantors; and that Goodwin (the cashier) also joined in this collateral contract, did not make it different."[3]

On the other hand, in the dissenting opinion, Elliott, J., says: "The contract sued on, an ordinary cashier's bond, undertakes, upon one and the same consideration, that all of the obligors shall be responsible for the conduct of one of their number. It does not guaranty the payment of an existing indebtedness, nor does it guaranty payment for goods to be sold the principal, but it undertakes that one of the obligors shall faithfully perform the duties of a trust confided to him. It is an agreement that one of the obligors will do certain designated things; it is not a guaranty that he will do those things, but a positive, direct, and express undertaking, that he will do them. The principal joins in the undertaking, and he, surely cannot be justly deemed a guarantor for himself. All the obligors are liable on the contract and all may be sued. There is no precedent liability. One and all of the obligors become liable on the default of one of the obligors to do what all have agreed and promised he shall do. There is no distinct and different liability; the default that makes one liable, therefore, makes all liable; their liability is on the same instrument, accrues at the same instant, and flows from one and the same breach of one and the same contract."[4]

The text books[5] usually treat of such persons as sureties, and they are usually held to the liabilities of sureties by the courts.[6]

Sureties are favorites of the law, and are not bound beyond the strict terms of their engagement, which, as against them, is said to be *strictissimi juris*.[7] Thus the surety on a bond cannot, generally, be held liable for a sum greater than the penalty named therein,[8] nor can he be held liable, as a rule, beyond the term or time limited by his undertaking.[9] But when the length of the principal's term is fixed by law, or the bond contains a recital of the time during which the principal shall hold his office or perform the prescribed duties, and the sureties bind themselves for such time "and until his successor is elected and qualified," or the like, the courts are not agreed as to the limit of the undertaking. Perhaps the weight of authority is to the effect that the sureties are bound in such case, only for the term specified, and perhaps, for such further time as is reasonably sufficient for the election and qualification of a succes-

[2] La Rose *et al* v. The Logansport Nat. Bank, Mss. No. 11471.

[3] Citing and commenting on Singer Mfg. Co. v. Littler, 56 Ia. 601; Locke v. McBean, 33 Mich. 473; Gage v. Lewis, 68 Ill. 606, as authorities to same effect.

[4] Citing Burns v. Singer Mfg. Co., 87 Ind. 541, opin. 544; Seavers v. Young, 16 Vt. 658; Markland Mining etc. Co. v. Kimmel, 87 Ind. 560, opin. 566.

[5] Thompson on Liabilities of Officers and Agents of Corporations 494, 544; Morse on Banking 211, 247; Brandt Suretyship and Guar. § 442 *et seq.*

[6] Cassady v. Trustees, 105 Ill. 560. And see authorities herein after cited in note 22.

[7] City of Lafayette v. James, 92 Ind. 240; s. c. 47 Am. Rep. 140; Urmston v. State, 75 Ind. 175; People v. Pennock, 60 N. Y. 421; Miller v. Stewart, 9 Wheat. 680; Brandt on Suretyship and Guaranty § 79, and authorities there cited; Murfree on Official Bonds § 620.

[8] Clark v. Bush, 3 Cowen 151; Brandt Suretyship and Guar. § 93; Brown v. Burrows, 2 Blatchf. 340.

[9] Urmston v. State, 73 Ind. 175; Kitson v. Julian, 30 Eng. L. & Eq. 326; City of Montgomery v. Hughes, 65 Ala. 201; Peoples etc. Association v. Wroth, 43 N. J. L. 70.

sor, no matter whether any successor is actually chosen or not.[10]

There is also some conflict in the authorities as to the liability of sureties for the default of their principal where new duties are imposed upon him after the execution of the bond. Bearing in mind the rule that sureties are favorites of the law, and are not held beyond the strict letter of their contract, it would seem that they ought not to be held liable for default of the principal in performing new and additional duties, where such duties are of a different character from those usually incident to the office, or specified in the bond, and such is believed to be the law.[11] But if the new duties are similar in character to the old and within the legitimate scope of the office, or such as may have been reasonably implied and considered when the bond was made, the sureties ought to be liable for default of the principal in the performance thereof.[12] It is believed that this distinction will go far toward reconciling many apparently conflicting authorities.

Where new duties are imposed by law, the sureties remain bound for the faithful performance of the original duties, whether their liability extends to the new duties or not.[13] And in a late case, where a book-keeper committed errors, it was held that the sureties were liable therefor, although he also performed the additional duties of teller, the errors not being connected with, nor induced by the latter employment.[14]

The undertaking is not merely for the honesty of the principal, but for capacity, and reasonable skill and diligence in the discharge of his duties, and if he fails in any one of these things, and loss is thereby incurred, the sureties are liable to make good the injury[15]

Such being the undertaking of the sureties, good faith requires that the obligee should notify the sureties of any default by the principal in these regards, and any fraud or concealment thereof by the obligee will release the sureties from liability for any loss or injury thereafter incurred.[16] Mere negligence on the part of the obligee, without intentional misrepresentation or concealment, would not, perhaps, release the sureties,[17] unless, at least, the default is of a nature indicating want of integrity in the principal, or unfitness for his position or office, other than mere moral delinquency not affecting his honesty.[18]

So, perhaps, a subsequent extension of time by the legislature will not release the sureties on a public officers' bond; but the authorities are conflicting. This is held in Maryland, Mississippi, Virginia;[19] but in Illinois, Missouri, and Tennessee, it is held that

[10] Chelmsford Co. v. Demarest, 7 Gray 1; Mayor v. Crowell, 11 Verm. 207; s. c. 29 Am. Rep. 224; Wapell etc. Co. v. Bigham, 10 Ia. 39; Kingston Mut. Ins. Co. v. Clark, 33 Barb. 196; Lord Arlington v. Merricke, 2 Sannd. 403; Peppin v. Cooper, 2 Barn. & Ald. 431; Brandt Suretyship & Guar. § 138 *et seq*; Mutual Loan Association v. Price, 16 Fla. 204: s. c. 26 Am. Rep. 703; See also Urmston v. State, 73 Ind. 175; Rany v. Governor, 4 Blackf. 2; Moss v. State, 10 Mo. 338; s. c. 47 Am. Dec. 116; Dover v. Trombly, 42 N. H. 69. *Contra*, holding liability may extend beyond term, State v. Berg., 50 Ind. 496; Butler v. State, 20 Id. 169; Thompson v. State, 37 Miss. 521; Placer Co. v. Dickerson, 45 Calf. 12; State v. Kurtzeborn, 78 Mo. 98; Compare Moore v. Boudinot, 64 N. C. 190.

[11] City of Lafayette v. James, 92 Ind. 240; s. c. 47 Am. Rep. 140; People v. Vilas, 36 N. Y. 459; Manufacturers etc. Bank v. Dickerson, 12 Vroom (N. J.) 448; s. c. 32 Am. Rep. 237; Pybus v. Gibb, 6 E. & B. 902; Bank of Upper Canada v. Covert, 5 Up. Can, K. B. R. 541; Munford v. Memphis etc. R. R. Co., 2 Lea 393; s. c. 31 Am. Rep. 616; People v. Tompkins, 74 Ill. 482; Compare Northern Ry. Co. v. Whinray, 26 Eng. L. & Eq. 488.

[12] German Bank v. Auth., 87 Penn. St. 419; s. c. 30 Am. Rep. 374; Strawbridge v. Baltimore & Ohio R. R. Co., 14 Md. 360; Detroit Savings Bank v. Ziegler, 49 Mich. 157; Where new duties are imposed by law, it is presumed that they were contemplated, and entered into the contract when the bond was executed. Marney v. State, 13 Mo. 7; U. S. v. McCarnay, 1 Fed. Rep. 104; People v. Vilas, 36 N. Y. 459, opin. 461.

[13] Gaussen v. U. S., 97 U. S. 584; Mayor v. Sibberns, 3 Abbot's Rep. 266.

[14] House Savings Bank v. Traube, 75 Mo. 199; s. c. 42 Am. Rep. 402.

[15] See an excellent article in 17 Alb. 340, entitled "Bonds of Bank Officers;" Commercial Bank v. Ten. Eyck, 48 N. Y. 305; American Bank v. Adams, 12 Pick. 303.

[16] Phillips v. Foxall, L. R. 7 Q. B. 666; Sanderson v. Aston, L. R. 8 Ex. 73; Franklin Bank v. Cooper, 39 Me. 542; Morse on Banking 230 *et seq*; Densmore v. Tidball, 34 Ohio St. 411.

[17] Bowne v. Mt. Holly Nat. Bank, (N. J. L.) 3 Am. & Eng. Corp. Cas. 339; Roper v. Sangamon Lodge, 91 Ill. 518: Tapley v. Waltham, 116 Mass. 275; Charlotte etc. R. R. v. Gaw, 59 Ga. 685; Wayne v. Bank, 52 Penn. St. 343; Union Bank v. Fastell, 6 La. 411, *Contra*; Graves v. Lebanon Nat. Bank, 10 Bush. 23.

[18] Bostwick v. Van Voorhis, 91 N. Y. 353; s. c. 1 Am. & Eng. Corp. Cas. 337; Atlas Bank v. Brownell, 9 R. I. 61; s. c. 11 Am. Rep. 231; Atlantic and Pacif. Tel. Co. v. Barnes, 64 N. Y. 385; s. c. 21 Am. Rep. 621; Home Ins. Co. v. Holway, 55 Ia. 571.

[19] State v. Carleton etc., 1 Gill 249; State v. Sweeney 60 Miss. 39; s. c. 45 Am. Rep. 405; Commonwealth v. Holmes, 25 Gratt. 771.

such extension will release the sureties;[20] and the Supreme Court of North Carolina seems to have held both ways in recent cases.[21]

Although the law favors sureties in many respects, yet, their contract being a direct one, as already shown, they are liable in the first instance, and may be sued jointly with the principal, without notice of the principal's default.[22]

But sureties on the bond of a public officer are not, as a general rule, liable for any default of the principal occuring before the execution of the bond.[23] Thus where the treasurer of a town, elected annually for five consecutive terms, served four years without bond, but gave a bond at the beginning of the fifth term for the faithful performance of his duties, it was held that his sureties were not liable for money with which he falsely credited himself during the first year.[24]

But where a treasurer was re-elected and reported a certain sum in his hands from the preceding term, the sureties on his official bond for the second term were held liable therefor.[25]

Sureties who are compelled to make good their principal's default have a general right to be subrogated to all other rights and secureties of the obligee or creditor.[26] The creditor holds collateral securities in trust for the benefit of the sureties, and where he has notice of such relationship, a release by him of the securities, will release the sureties to that extent.[27] This right was well stated by Sir Samuel Romilly in his argument, and approved by Lord Edon, in his opinion in the case of Craythorne v. Swinburn.[28] "A surety," he says, "will be entitled to every remedy, which the creditor has against the principal debtor; to enforce every security and all means of payment; to stand in the place of of the creditor, not only through the medium of contract, but even by means of securities entered into without the knowledge of the surety; having a right to have those securities transferred to him, though there was no stipulation for that; and to avail himself of all those securities against the debtor."[29]

As between themselves, also, sureties have certain fixed and well established rights. Where one is compelled to pay the entire loss, or any part greater than his share of the loss, occasioned by the principal's default, he may exact contribution from his co-sureties.[30] And where one, after all have become bound, without the knowledge or agreement of the other sureties, obtains from the principal anything for his indemnity, it inures to the benefit of all.[31]

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[20] Davis v. People, 1 Gilm. 409; State v. Roberts, 68 Mo. 234; s. c. 30 Am. Rep. 788; Johnson v. Hacker, 8 Heish. 388.

[21] Prairie v. Worth, 78 N. C. 169; Prairie v. Jenkins, 75 N. C. 545.

[22] Dougherty v. Peters, 2 Robinson (La.) 534; Mc Gehee v. Gewin, 25 Ala. 176; Brandt Suretyship and Guar. § 1.

[23] Brandt Suretyship & Guar. § 449; Myers v. U. S., 1 McLean 493; Farrar v. U. S., 5 Pet. 373; Bessinger v. Dickerson, 20 Ia. 261; U. S. v. Boyd, 15 Pet. 187.

[24] Inhabitants of Rochester v. Randall, 105 Mass. 295; s. c. 7 Am. Rep. 519; Vivian v. Otis, 24 Wis. 518; s. c. 1 Am. Rep. 199.

[25] Roper v. Sangamon Lodge, 91 Ill. 518; s. c. 33 Am. Rep. 60; Morley v. Town of Metamora, 78 Ill. 395; s. c. 20 Am. Rep. 266. And see Bruce v. U. S., 17 How. 437; Commonwealth v. Adams, 5 Bush (Ky.) 41; Choate v. Arrington, 116 Mass. 552.

[26] Copis v. Middleton, 1 Turn & Russ. 224; Townsend v. Whitney, 75 N. Y. 425; Berthold Admx. v. Berthold, 46 Mo. 557; Enders v. Brune, 4 Randolph (Va.) 438; Bigelow,s Equity 291; 1 White & Tudor's Lead Cas. in Eq. 144 *et seq.* and authorities there cited.

[27] Crine v. Fleming, 101 Ind. 154; See also Bunting v. Ricks, 2 Dev. & Bat. Eq. 130; s. c. 32 Am. Dec. 690.

[28] 14 Ves. 159.

[29] Quoted with approval by Story in his 1 Eq. Jur. § 499 *n.* 2.

[30] Brandt Suretyship & Guar. § 220; Bigelow's Eq. 247; 1 Story's Eq. Jur. § 492 *et seq*; Camp v. Bostwick, 20 Ohio St. 337; s. c. 5 Am. Rep. 669.

[31] McCune v. Belt, 45 Mo. 174; Seibert v. Thompson, 8 Kans. 65; Miller v. Sawyer, 30 Vt. 412; Hartwell v. Whitman, 36 Ala. 712; Shaeffer v. Clendenin, 100 Penn. St. 565; s. c. 17 Cent. L. J. 299.

CARRIERS' SERVANTS.

The carrier, like the inn-keeper, is an important person in the eye of the law, for he is compelled to carry on the request of any person who tenders goods to be carried, and he is liable to an action if he refuses, provided always, of course, as in the case of the inn, that there is room or accommodation in the vehicle. It is also a trite maxim, that the carrier is an insurer of the goods till the time of delivery, and is answerable for every loss or injury to the goods, no matter how this is brought about, unless occasioned by

the act of God or the king's enemies. This great responsibility, we are told, long ago weighed heavily on the carrier's mind, and he used to insert notices in the newspapers and elsewhere, to announce that he would not be accountable for goods beyond a certain sum, unless insured and paid for,on delivery to him. Great litigation arose out of these special agreements; and as to the supposed knowledge of the customer, so that a statute had to be passed to simplify the matter. The Carriers' Act,[1] enacted, that in future no common carrier would be liable for loss or injury to goods above the sum of £10, unless the value was declared,and increased charges paid or agreed upon. But by the 8th section nothing in the Act should be deemed to "protect the carrier from liability to answer for loss or injury to any goods or articles whatsoever, arising from the felonious acts of any coachman, guard, bookkeeper, porter, or other servant in his or their employ." As previously stated, a similar enactment has since been passed for the protection of innkeepers, namely, the statutes 26 and 27 Vict. c. 41, limiting the liability to £30. In both cases the felonious acts of servants make an exception to the protection of the acts. But the innkeeper loses his protection also not only for felonies, but for any default or wilful neglect of his servants. Most of the cases, therefore, apply to both carriers and innkeepers, and great difficulty seems to arise in such cases as to what is *prima facie* evidence, to go to the jury, that the felony or default was in the servants of either.

One case, of Boyce v. Chapman,[2] was an action against a carrier for loss of goods, where, the carrier having set up the defence that no notice was given under the Carrier Act, 1 Will. 4 c 68, the reply was that the defendant's servant had stolen the goods. In that case the plaintiff proved only circumstances of suspicion, but the defendant omitted to call the suspected servant as a witness, and on this point, Tindall, C. J., said, that it was incumbent on the defendant to clear up the doubt by calling his servant as a witness, and it was in his power to produce that evidence, the court refused him a new trial. The case of Metcalfe v. London, Brighton, and South Coast Railway Company,[3] began the same way, and the question was whether there was evidence to go to the jury of a felony by the carrier's servant. All that was proved was, that the plaintiff's box was sent to the carrier by a servant of the house in which the plaintiff lodged and, on its being delivered at the end of the journey, the box had been opened and the contents abstracted. The remarks of Willis, J., in that case, were to this effect. The felony might have been committed either by one of the defendant's servants, or some other person. In order to make out a greater degree of likelihood that the act was committed by a servant of the carrier, than by anybody else, the plaintiff might have shown a *prima facie* case, had the defendants only been carriers of goods, or if it had appeared that the box could not have been exposed, so that other persons coming to the railway might have had access to it. Everybody knows that is so. To complete the circumstantial evidence, therefore, there was in that case wanting, some fact which was more consistent with a loss by felony, or a servant of the company, than with any reasonable view of the case to the contrary.

Two important cases as to felonies by carriers' servants occurred about ten years ago, when these subjects were again very elaborately discussed. The case of Vaughton v. London and North Western Railway Company,[4] was an action against the carriers for the loss of certain articles of jewellry. The plaintiffs were wholesale jewellers at Birmingham, and sent a box of jewellry from that place to their agent at Liverpool without declaring the value. The only question between the parties was, whether the loss had been occasioned by the felonious acts of the railway servants. The practice at Liverpool station was, that such boxes were taken to the parcel office, which was not accessible to the public, and a collecting agent called for them and delivered them. There was an entry made of this box in the collecting rgent's book, showing that he received it for delivery to the hotel where the consignee was found. On the arrival at the hotel this box was missing from the collecting agent's van, and was

[1] 11 Geo. 4 & 1 Will. 4, c. 68.
[2] 2 Ring. N. C. 222.
[3] 4 C. B. N. S. 307.
[4] L. R. 9 E. 93.

never afterwards delivered. About ten days later some of the articles of jewellry which had been in the box were discovered at a pawnbroker's shop, and which had been pawned by one who was not in the company's service. This person, when arrested, said he had found the articles lying loose at a part of the railway station where the public had access. One of the company's clerks was also found in possession of one of the articles of jewellry, and which he said he had picked up on the siding of the station, and other bits of jewellry were picked up by another servant. At the trial, the defendants called no witnessess, but the judge told the jury they must be satisfied that the jewellry must have been stolen by one or more of the railway servants or of the collecting agent's servants. The jury found for the plaintiffs, and afterwards an attempt was made to set aside the verdict as against the weight of evidence. The court held that there was some evidence to support the verdict. One circumstance was treated as of considerable importance, namely, that the company did not call any of their servants as witnesses. Kelly, C. B., said that the circumstance tended to fix suspicion both on the booking clerk and on the collecting agent. And Pigot, B., observed that he thought it enough if the evidence pointed to this, that a felony of the article had been committed, and that it was more consistent with the facts proved, and with the probability that it was committed by the servants of the company than by any other person. That was the test put by Willes, J., in the former case. It was not shown that any of the public could have gone into the parcels office and taken away, or could have gotten into the cart and taken out without being seen, and it must be presumed that nobody could have done so. That seemed to bring the felonious abstraction to a point both of place and time which was more consistent with its having been stolen by one of the company's servants than by anybody else.

That case showed how a company may be fixed with liability under the Carriers Act for the servant's felonies. The next case, however, shows the converse difficulty. The case of Macqueen v. London and North Western Railway Company[5] was an action to recover the value of some pictures which had been delivered to the defendants at Cardiff, to be forwarded to London. The issue raised under the Carriers Act was whether the pictures were stolen by the railway porters. At the trial it appeared that the case containing the pictures was received at the Cardiff railway station. It was weighed and put on a truck on the line, and covered over with a tarpaulin, and fastened down with ropes. The truck was left standing for about eight hours from the middle of the day till the evening on a siding a mile long, in a very low neighborhood in the town of Cardiff. The railway premises were enclosed and divided from the road by a fence. There was a way across the yard which was used as a thoroughfare, and a gate in the fence which was left open up to six o'clock in the evening, after which hour it was closed, except to foot passengers. During the day there was much traffic. The pictures were contained in a large packing case, which weighed more than a hundred weight. This case was stolen out of the truck on the defendants' premises. No one of the defendants' servants was called to prove that the felony had not been committed by the railway servants. And it was contended on the behalf of the company that there was no evidence to go to the jury that the loss had occurred owing to the felonious acts of the railway servants. The judge left the case to the jury, who found for the plaintiff, but leave was reserved to move to enter a non-suit, if the court should think that there was no evidence to go to the jury. The plaintifis relied on the dictum of Willes, J., already cited, that if the state of the facts made it more probable that the felony was committed by the company's servants than by third persons, then the verdict for the plaintiff was right.

The propriety of the ruling of the judge at the trial was in question. The court said that it was not necessary to show a taking by any individual servant, but it was enough, if proof was given to the satisfaction of the jury, that the taking was by some one or more of the servants of the company. The evidence, however, only amounted to this, that the railway company's servants had something to make them believe that the box was valuable, but in proving this, it was also

[5] L. R. 10 Q. B. 569.

proved, or came out in cross-examination, that there was also evidence of this being a large station to which a great number of people had access, and where the defense against marauders were slight, and there was ample opportunity for a stranger to come in and steal the goods. There was nothing to show a felony by the company's servants, except their greater facility of access, while on the other side there was the opportunity presented to strangers. The probability would and ought to weigh with a jury when a *prima facie* case had been made out, but the plaintiff failed to do that, if he showed no more than that greater facility existed for the railway company's servants to obtain access to the goods. If it were said that, that was enough to go to the jury, it would be to read the Act so that the owner could recover by showing a loss by a felonious act, leaving out the provision that it must be the act of the company's servants. But the felony must be by the company's servants, and this puts the *prima facie* proof on the plaintiff. He must show something more than that a felony has been committed, and must make out a *prima acie* case that it was committed by the defendants' servants. If this were not so, the Act would be no protection. This case was said to differ from Vaughton v. London and North Western Railway Company, because in that case the company's servants had done certain specific acts which fixed the liability to them alone.

Such being the mode of fixing liability on carriers for felonies of ther servants, there may be noticed also a curious case where the difficulty was in saying whether the carrier was liable because a person pretended to be their servant, and so got possession of the goods and stole them. In Way v. Great Eastern Railway Company,[6] the action was brought for the loss of pictures. These were properly packed in wooden cases and delivered at the defendants' station at Chelmsford addressed to Rochester. The value was not declared, but if declared to be, as they were, of the value of £1000, then a policeman would have been sent in charge of them. The defendants carried the pictures to their station in London, where, besides the defendants' servants, the public had access. The pictures were there put into the defendants' van in order to be taken to another railway station for transit to Rochester. The course of business was for a delivery sheet to be got by the defendants' servant before he could pass through the gate, and this required time. During the interval a strange man, professing to be a servant of the collecting agent, got the ticket and so got possession of the van and stole the pictures. The question raised was whether the defendants were liable. The court had no difficulty in saying they were not. Blackburn, J., said they may have been negligence and even gross negligence on the part of the defendants' servants. Rut that did not come within the 8th section, which took away the protection of the Carriers Act only where there had been a felonious act by the servants. Accordingly judgment was given for the carriers.

These cases will illustrate both the difficulty and the certainty of fixing carriers with their servants' criminal acts.—*Justice of the Peace.* [English.]

[6] 1 Q. B. D. 692.

AGENCY—PURCHASE BY AGENT OF PRINCIPAL'S PROPERTY — GOOD FAITH INSURANCE—INTEREST—AGENT CHARGEABLE WITH LOSSES.

ROCHESTER v. LEVERING.

Supreme Court of Indiana, January 9, 1886.

1. PRINCIPAL AND AGENT—*Rule as to Purchasing Principal's Property—When Confidential Agent may Purchase.*—While an agent to sell property cannot, either directly or indirectly, purchase the same from himself, yet a general confidential business agent, in the line of whose duty it is to sell certain real estate, may, if he acts in good faith and discloses all the facts purchase the same from his principal.

2. ———. *Agent Must Show Good Faith.*—When such a transaction is seasonably challenged, however, the burden is on the agent to show that he dealt fairly with his principal, and imparted to him all the information concerning such property possessed by himself.

3. ———. *Lapse of Time—When Certainty to Common Intent is Sufficient.*—Where in such case the transaction has remained unchallenged for a large number of years, and the value of the real estate has fluctuated from time to time, resulting in a final increase, it is sufficient for the agent to show, as regards the original price paid by him, with certainty to a common intent that it was fair and equitable.

4. ———. *Sale not Affected by Subsequent Independent Transactions.*—The sale of the land to the agent

n such case is not affected by independent subsequent transactions, having no relation to the principal transaction.

5. ——. *Insurance—Agent Entitled to Credit, Although Takes Policy in Own Company.*—Where such agent pays insurance premiums on the property of his principal, he is entitled to credit therefor, although he may have been the agent of the insurance company, provided he informed the company that such property was in his control, and they permitted the policies to stand without attempting to avoid them.

6. ——. *Use of Principal's Money—Rate of Interest.*—Where, in such case, the agent had to keep large sums of money constantly available for his principal, he is chargeable with interest only at the rate of 6 per cent., although he mingled some of the property of the principal with his own, and used it in his own business, and although money was bringing at the time 10 per cent. interest.

7. ——. *When Agent is Chargeable With Losses.*—Where the agent loans the money of his principal, and by neglect fails to collect it when he might have done so by proper proceedings, he is chargeable therewith.

8. ——. *Judgment Against Agent Without Relief.*—Under § 577, Rev. St., 1881, the judgment against an agent who has collected money for his principal, and has lost the same through his own neglect, or who is liable for it as for a trust fund, should be rendered without relief from valuation or appraisement laws.

Appeal from Tippecanoe Circuit Court.

S. P. Baird and *McDonald, Butler & Mason*, for appellant; *F. B. Everett, Coffroth & Stuart*, and *F. H. Levering*, for appellee.

MITCHELL, J. delivered the opinion of the court.

A complaint filed by John Levering against Madeline Rochester, and a cross-complaint filed by the latter against Levering, constitute the basis of the controversy exhibited in the record in this case. The complaint seeks a recovery upon an account exhibited with it for services rendered, money loaned, paid out, and expended by the plaintiff at the defendant's instance and request. The cross-complaint charges that from the year 1862, down to and including the year 1878, the plaintiff, Levering, was in the relation of agent and attorney to the defendant, Mrs. Rochester, having in charge the control and management of all her property and business; and that while in such relation he so managed her affairs and business and dealt with her as that, upon an accounting and proper adjustment of their business, a large sum of money, amounting to over $20,000, would be due her. Upon issues made, the case was heard, and a special finding of facts, with conclusions of law stated thereon, filed by the court. With the facts as found, both parties are content, while each excepted to, and are yet, by the assignment of errors and cross-errors, respectively, contending against, some of the conclusions of law.

The controversy involves a great variety of transactions, covers a period of more than 18 years of business, and required the adjustment of an account aggregating but little short of $80,000. That it was reduced to the order and symmetry in which the special findings present it, is abundant evidence that the case was tried with extraordinary care and ability.

The facts upon which the first conclusion of law is based are, in substance, as follows: Mrs. Rochester, in addition to a large amount of other property, was the owner of 30 acres of land, in the extreme south part of the city of La Fayette. Through her agents, Mr. Levering and his brother, she sold 15 acres off the south side of this tract to Owen Ball for $4,000, in August, 1865. About the same time Ball offered to purchase the remaining 15 acres for $3,500. This was refused. The appellant and Mr. Levering about that time went to Ball, and solicited him to purchase the remaining 15 acres for $4,000. Ball again offered $3,500, and would give no more. Mrs. Rochester then requested the appellee to find a purchaser for this tract, and other unimproved lands owned by her, which she was anxious to sell. This the appellee tried to do, but the highest offer made for the tract in question was $3,500 by Ball. The tract was unfenced, unimproved, and unproductive, and its main value was probable and prospective for platting into town lots with a view to selling it in lots. The court finds it difficult to state the real value of the tract at the time of the sale to Levering, hereafter mentioned, but its approximate value at that time was found to be $4,500. It is found that on the nineteenth day of February, 1869, while Mr. Levering was acting as the confidential agent of Mrs. Rochester, and while acting as her agent to sell the tract of land mentioned, he proposed to buy the land from her himself, at the price of $4,000, agreeing that he would lay it out into lots, as an addition to the city of La Fayette, and that he would pay the price mentioned, with six per cent. interest, in money or notes out of the proceeds of sales of the lots. He represented to her that, in his opinion, it would be better for her to sell it to him than to hold it. It is found by the court that he fully and correctly communicated to her all the facts of which he had knowledge about the tract of land and its value, and that he made no misrepresentation, nor did he conceal from her any fact concerning the land or its value; and that the price offered, so far as could then be known, was not manifestly inadequate. Mrs. Rochester had full confidence in the judgment of her agent, and relied upon his advice as to the propriety of making the sale and concerning the value of the land. Under these circumstances, and without consulting any person other than Mr. Levering, the appellant sold the tract to him on the terms proposed, and executed to him a warranty deed therefor. As evidence of his obligation to her for the purchase price, he executed an instrument of writing, signed by him, in which the purchase of the land is recited, and in which his agreement to pay is stated as follows:

"I am to lay out said land into town lots as an addition to the city of La Fayette, and will pay to said Madeline Rochester, out of the proceeds of the sales of said lots, in money or in promissory notes taken, the sum of four thousand dollars, with interest at the rate of six per cent."

It is found that the tract was laid out into 69 town lots, in the month of April, 1869; that a plat was filed calling it "John Levering's addition to La Fayette;" and that, from May 28, 1869, to August 9, 1874, Levering sold 39 lots, receiving for principal and interest from such sales in the aggregate, $9,010,85, leaving 30 lots still unsold. The purchase money was never actually paid by Levering, but, in a settlement had on the fifteenth day of June, 1874, which was afterwards found to be erroneous, Levering credited Mrs. Rochester's account with the $4,000, and the accrued interest thereon, according to the contract as modified. The appellant paid out about $600 for the improvement of Fourth street, which ran along or through the tract; but this sum was paid by using a judgment which belonged to Mrs. Rochester against one Austin. This judgment was used by Mr. Levering upon an agreement with Mrs. Rochester that he would change his obligation to her, so as to allow ten per cent. interest on the $4,000 purchase money for the land instead of six. This was accordingly done. The court also found that Levering had a well-appointed and centrally located office in the city of La Fayette, with two or three clerks constantly in attendance; that, by reason of these facilities and his extensive business connections, and his energy and industry, he had great advantage in effecting sales of real estate; that, soon after the purchase from Mrs. Rochester, Fourth street lying along the east line of the addition laid out of the land purchased was improved, and, on that account, lots in that locality became more desirable; that many of them were sold at prices largely in excess of the price paid for the land in bulk. The court finds it impossible to state how much of the advance price obtained was due to the superior facilities and the individual energy, industry, and efforts of Levering. Among other facts found in addition to those above recited, which cast some light on the transaction, it may be stated that it was found that Mrs. Rochester was a lady of superior intelligence, but inexperienced in business matters, or in relation to the value of real estate; that she had entire confidence in the judgment and honesty of Mr. Levering; that he generally explained all business transactions to her—and that he had the entire management and control of her property and business; that he kept her accounts, which were always open to her inspection; and that she frequently examined them.

The first conclusion of law stated by the court was that the sale of the land was valid and binding, and free from actual or legal fraud; and that the plaintiff's (Levering's) account should be charged with the sum of $4,000, the purchase price of the land, as so much money received by him at the date of the sale. The conclusion of law which affirms the validity of this sale is the chief subject to which the appellant's argument is directed. It may be remarked that, so far as the contention relates to sales by a trustee or other having a power or agency to sell property which in the execution of such agency the agent or trustee either directly or indirectly sells to himself, the argument is not deemed to be relevant to the case under consideration. That an agent to sell property cannot, either directly or indirectly, become the purchaser from himself, and that such sale is voidable absolutely, at the election of the principal or beneficiary, without regard to its fairness, are inflexibly established propositions. The facts found do not make this a case of that description. While they disclose a relation of the closest and most confidential character between principal and agent, so far as the general management of the financial and business affairs of the principal were concerned, they also showed that the agent had no power to sell; and that he did not, in fact, make the sale. The agency with respect to the particular tract of land is stated in the following language: "That said Madeline was desirous of selling this tract, as well as her other unimproved land, and requested said plaintiff to find a purchaser therefor, which he tried to do; * * * that while acting as the confidential agent of said Madeline, and her agent to sell said fifteen-acre tract, plaintiff proposed to buy it himself." Fairly interpreted, this means that, while in the relation of general confidential business agent to the appellant, Mr. Levering was requested to find a purchaser for the land who would pay a fixed price, and, while so acting as agent to sell, he proposed to purchase the land from his principal, and negotiated with her the purchase which is now the subject in controversy.

The case is one arising out of a transaction between a confidential agent and his principal, who purposely and intentionally dealt with each other concerning a subject-matter involved in the agency. The result of the negotiation between the two was that the principal consciously and knowingly transferred to her confidential agent the land in controversy, at a stipulated price. While a transaction of the character disclosed is not necessarily voidable at the election of the principal, a court of equity, upon grounds of public policy, will nevertheless subject it to the severest scrutiny. Its purpose will be to see that the agent, by reason of the confidence reposed in him by the principal, secures to himself no advantage from the contract. When the transaction is seasonably challenged, a presumption of its invalidity arises, and the agent then assumes the burden of making it affirmatively appear that he dealt fairly, and in the strictest of faith imparted to his principal all the information concerning the property possessed by him. The confidential relation and the transaction having been

shown, the *onus* is upon the agent to show that the bargain was fair and equitable; that he gave all the advice within his knowledge pertaining to the subject of the sale and the value of the property; and that there was no suppression or concealment which might have influenced the conduct of the principal. McCormick v. Malin, 5 Blackf. 508-522; Cook v. Burlin, etc., Co., 43 Wis. 433; Porter v. Woodruff, 36 N. J. Eq. 174; Young v. Hughes, 32 N. J. Eq. 372; Farnam v. Brooks, 9 Pick. 212; Moore v. Mandlebaum, 8 Mich. 433.

As applicable to cases of the character under consideration, the rule is succinctly stated by a learned author in the following language:

"Passing to dealings connected with the principal's intervention, in any contract of purchase or sale with the principal, or other transaction by which the agent obtains a benefit, a presumption arises against its validity which the agent must overcome, although this presumption is undoubtedly not so weighty and strong as in the case of a trustee. The mere fact that a reasonable consideration is paid, and that no undue advantage is taken, is not of itself sufficient. Any unfairness and underhanded dealing, any use of knowledge not communicated to the principal, any lack of the perfect good faith which equity requires, renders the transaction voidable, so that it will be set aside at the option of the principal. If, on the other hand, the agent imparted all his own knowledge concerning the matter, and advised his principal with candor and disinterestedness as though he himself were a stranger to the bargain, and paid a fair price, and the principal on his side acted with full knowledge of the subject-matter of the transaction, and of the person with whom he was dealing, and gave a full and free consent—if all these are affirmatively proved, the presumption is overcome, and the transaction is valid." 2 Pom. Eq. Jur. § 959.

Subject to the burdens thus imposed, as was stated in Fisher's Appeal, 34 Pa. St. 29, "it never has been supposed that a principal might not sell to his agent, or the client to his attorney; and that their titles thus acquired would not be good in the absence of fraud on their part."

In the light of the foregoing principles we may now briefly recur to the facts. Mrs. Rochester and her agent called on Mr. Ball, who had bought half the 30-acre tract, and solicited him to purchase the remaining 15 acres at the price of $4,000. He refused to pay more than $3,500. The agent then, being solicited to find a purchaser, was unable to secure an offer in excess of that made by Ball. The property being unproductive, its value purely prospective and largely contingent on events that might or might not happen—such as the growth and improvement of the city to which it lay contiguous, and the demand which might arise for lots in that direction—can it now be said, after this lapse of time, that the price paid was not fair? That it was difficult to ascertain the real value of the land with much certainty at the time of the sale is disclosed in the special finding of facts, and that it was necessarily so, is inherent in the very nature of the case. Considering the length of time which intervened from the sale until the investigation was set on foot; the condition of affairs at the time the sale was made; the inflation in value, and the speculation in real estate which ensued, and continued until the latter part of 1873, covering the period during which substantially all the lots disposed of were sold by Levering—and the obstacles which lay in the path of the investigation are apparent. That the approximate value, as arrived at under these circumstances, is stated to have been $4,500, fully justfies the further statement that the price paid was not manifestly inadequate—in effect, that the price was fair. As was said by Mr. Justice Story, in Prevost v. Gratz, 6 Wheat. 481:

"Length of time necessarily obscures all human evidence, and, as it thus removes from the parties all the immediate means to verify the nature of the original transactions, it operates, by way of presumption, in favor of innocence and against imputation of fraud. It would be unreasonable, after a great length of time, to require exact proof of all the minute circumstances of any transaction, or to expect a satisfactory explanation of every difficulty, real or apparent, with which it may be incumbered."

When it is remembered that the transaction was had in February, 1869, and that it was permitted to stand unchallenged, through all the changes in the situation and fluctuation of prices, until January, 1883, we think all that can fairly be required of the defendant is to make it certain to a common intent that the price paid was fair and equitable. This has been done. That the purchaser, by the succession of events—the rise in value of the property on his hands, coupled with the energy, ability and industry, and his facilities for selling lots—sold the property for more than he paid for it cannot now be taken as the measure of its value at the time of the purchase, nor can it be assumed on that account that the plaintiff was overreached in the purchase. Fisher's Appeal, *supra*. Having paid a fair price for the property, and fully communicated to his principal all the facts within his knowledge about the land and its value—misrepresenting nothing, concealing nothing—the appellee has brought the transaction within the rule which authorizes it to stand.

As related to the subject we are considering, it was urged on the argument that the obligation given for the purchase price was such that the purchaser came under no absolute contract to pay for the land; that his liability to pay was contingent upon his realizing the amount stipulated to be paid from sales of lots; and that this was so unfair as that the sale should have been set aside. We do not think the contract admits of the construction contended for. The contract recited that the land was conveyed at the price of $4,000. The import of this was a debt for a specified

amount then presently due. The unilateral stipulation contained in the writing, to the effect that the purchaser would lay the land out into lots, specifying no time, and pay the amount with interest, out of the proceeds of sales, in money or promissory notes, was, if of any force whatever, at the most an agreement on his part that he would do so within a reasonable time.

It is insisted that because the Austin judgment which belonged to Mrs. Rochester was used by her agent to pay for the street improvements, and because the amount of the purchase price of the land, and the accrued interest thereon, were liquidated by being included in a partial settlement made in 1874, which was afterwards found to be erroneous, an imputation of bad faith in making the purchase of the land arises. These were all matters occurring long after the transaction which is assailed was completed, and cannot be supposed to have been contemplated. They did not exist at the time the land sale was made, and could, consequently, have exerted no influence upon it, one way or the other. They were matters only relevant to be considered in the adjustment of the accounts between the parties, and in that connection they were considered by the learned court, and properly adjusted. The sale of the land cannot be affected by independent dealings or transactions which were had afterwards, and which had no relation to the principal transaction here involved. Sherman v. Hogland, 54 Ind. 578.

Having thus arrived at the conclusion that upon the facts found, the purchase of the land was not in itself impeachable, we need not consider the proposition advanced, and much debated in the briefs, that the plaintiff's proceeding to set it aside has been so long deferred as to bring it within the rule applicable to stale claims.

It was found by the court that during the continuance of Mr. Levering's agency and management of Mrs. Rochester's affairs he attended to procuring insurance against loss by fire upon her property. He was at the same time the agent of the Ætna Fire Insurance Company, and from year to year, or as insurance was deemed necessary, policies of insurance were written by him upon her property, and the amount of premiums thus accruing were charged against her in his account. Several hundred dollars was in this manner charged against her, and in taking the account the learned judge, at *nisi prius*, allowed for the items thus charged. It is now insisted that, because the agent of the insurance company was also the agent of Mrs. Rochester, the policies issued by him as agent to cover her property against loss were void; that they afforded no protection, and that the account for premiums paid should have been disallowed. New York, etc., Co. v. National, etc., Co., 14 N. Y. 85.

It is found by the court that while it was known to the insurance company that Mr. Levering was the agent of Mrs. Rochester in effecting the insurance, it was stated in his reports made to the company that the property insured was controlled in his office. Insurance so effected would at the most be only voidable, depending upon the relation of the agent of the company to the property, the interest and authority which he had in respect of its management, and the knowledge possessed by the company of such relation and authority. That the insurance company was informed that the property insured was controlled by its agent, or in his office, was presumptively sufficient to indicate to it that the matter of securing indemnity by way of insurance was also under his control. The policies having been permitted to stand with this information, we have no doubt they would have been enforceable against the company. At all events, as the policies were at the utmost only voidable upon the return of the premium paid, we cannot presume that they would have been avoided in case of loss, and by indulging such presumption deny the appellee's right to be reimbursed for the premiums paid.

The next question presented for consideration relates to the right of the appellee to receive compensation for services while conducting the business of Mrs. Rochester. It is found by the court that during the continuance of the agency various items, amounting in the aggregate to about $3,000, were changed in the account against Mrs. Rochester for service in attendidg to her business. Concerning these charges, the court made the following specific finding:

"That all of said charges for services are reasonable, and that it was fully worth, substantially, more than the amounts so charged by said agents, and by said plaintiff as such agent, to do the work done by them as such agents, or by said plaintiff as such sole agent."

The account for services was allowed by the court below. Fully recognizing the rule that where an agent has violated his trust, or has been guilty of fraud or gross neglect of duty, thereby imposing upon his principal the necessity of expensive litigation in order to secure his rights, the penalty for such fraudulent conduct or willful violation of duty is the forfeiture of all compensation. Yet this rule should never be applied to mere mistakes in the keeping of an account, or errors of judgment, or other omissions which do not amount to misconduct or gross and culpable neglect or disregard of duty. We are unable to discover anything in the facts of this case which demands the application of the rigorous rule contended for.

The only other objection made to the conclusions reached by the *nisi prius* court is in respect of the rate of interest allowed. It is contended that in stating the account interest at the rate of 10 per cent. instead of 6 should have been charged against the agent for all sums found to have remained in his hands. The findings state that appellee had possession of all appellant's moneys, securities, and books of account, with authority to invest,

reinvest, and collect her moneys, and that she relied upon him to loan and collect the same; that during the agency of appellee, appellant's moneys, as received by him, were mixed with his own moneys, and used in his business; that from the first of July, 1868, to the first of July, 1878, the current rate at which money was loaned, secured by first mortgage on real estate in Tippecanoe county, was 10 per cent. per annum, interest payable yearly, the borrower to pay all expenses of making the loan, so as to net to the owner of the money 10 per cent. per annum. While the manner of mixing and using the moneys belonging to his principal is not to be commended, it is nevertheless inferable from the accounts exhibited in the record, and the general character of the dealings between the parties as shown by the special findings, that for all the current expenses of herself and family, and for all expenses incurred in maintaining her property, Mrs. Rochester relied upon her agent to respond with money, as the occasion might require. This necessarily involves the keeping of the money, either of his own or his principal's, always available. It may be inferred that the character of the business relation between Mrs. Rochester and her agent was such that it imposed upon the agent the entire responsibility of looking after her business, to such an extent that her entire time and thought could be and were devoted to rearing and educating her children, without further concern than to call or make drafts upon her agents as money was needed. Considering that her fortune was such as to involve the handling of the amount exhibited in the account stated, it may well be that the necessity for considerable sums was frequent. The amount on hand uninvested at any one time does not seem to have been large compared with the affairs under control. That investments were not more closely made, cannot, under the circumstances, be imputed to such neglect as should charge the agent with the highest obtainable rate of interest. Indeed, if any error at all was committed by the court below, it was in applying too rigorous a rule against the agent by charging him with compound interest on all sums found to be in his hands, as hereinafter stated.

We have thus disposed of all the errors assigned by the appellant. As there was a judgment against the appellee below, and inasmuch as he excepted to some of the conclusions of law stated, it is proper we should consider the cross-errors signed by him in this court, notwithstanding the conclusion so far reached on the errors assigned by the appellant has resulted in discovering no error. Kammerling v. Armington, 58 Ind. 384. The case is not analogous to nor controlled by Thomas v. Simmons, 1 Wkly. Rep. 557.

It was found that in the course of his agency the appellee loaned $482.80 of the funds of his principal to one McBride, who was at the time in debt, but able to pay; that the money so loaned might have been collected if proper steps had been taken to that end, but that the appellee took no steps to collect it, and the amount was lost. This sum was charged by the court below against the appellee, and this is one of the grounds of complaint made by a cross-error assigned. The facts found, justify the conclusion reached in that regard. It is apparent that the appellee had permitted himself to become so far involved in the affairs of McBride, who was known by him to have come into such financial stress, that he could not with propriety neglect the debt due from him to his principal. We think, while he was not guilty of willful default he was chargeable with such supine negligence as made him properly liable. He was under an obligation, at least, to use the same diligence in behalf of his principal that he used in respect of his own affairs. This, it is shown, he did not do.

The next cross-error assigned relates to the action of the court in charging the appellee with the amount of the Austin judgment, which was used by the appellee in paying for street improvements. Without rehearsing the facts, we think he has no just ground of complaint in that regard.

It is next complained of that the court erred in its sixth conclusion of law, the force of which set aside the transfer of certain lots conveyed by McBride to the appellee, and subsequently conveyed by him to Mrs. Rochester, in liquidation of a debt due from McBride to her, the payment of which the appellee had assumed. The appellee had become so complicated with the affairs of McBride that he found it expedient to accept the conveyance of a number of lots, and to assume the payment of a loan of money belonging to Mrs. Rochester, which he as agent had made to McBride, and which was secured by mortgage on the lots transferred by McBride to the appellee. This debt so assumed and secured, the agent subsequently discharged by transferring some of the lots conveyed by McBride to him to Mrs. Rochester, the transfer of which was accepted in payment of the debt assumed under his advice. They were found to be of much less value than the amount of the debt. Without further rehearsing the facts, it is sufficient to state that, within the rules already referred to, governing dealings between principal and agent, we think the conclusion reached by the court was right.

The fourth cross-error assigned, which relates to the seventh conclusion of law, is not insisted upon in the argument, and is therefore waived.

The next cross-error assigned relates to the method adopted by the court in stating the account and charging interest on balances found to be in the appellee's hands. The method adopted was to consolidate all the accounts, take the difference between the receipts and disbursements for the first current year as the first principal, upon which interest was computed for one year at 6 per cent., and this interest was carried into the account of the second year. At the end of the second year the account was to be balanced, and

interest computed on the balance, and carried into the account for the third year, and so on down through each year to the end of the current year in which the plaintiff ceased to be agent. From thence, down to the date of the taking the final account, interest was computed with annual rests at 6 per cent. Upon the facts as they appear, and in the absence of the evidence, there is nothing before us which authorizes us to say this was wrong. Without a further rehearsal of the facts this much may be said: While the method adopted by the court in stating the account may have resulted in some apparent hardship to the appellee, the impression comes irresistibly from the whole record that he allowed his accounts to come into such a state of confusion and irregularity as must preclude any ground of complaint on his part, even though the court in unravelling the tangled skein felt obliged to cast some doubts in respect of interest in favor of his adversary.

Under section 557, Rev. St. 1881, it was right that the judgment should have been rendered without relief from valuation or appraisement laws. We do not forget that some of the items which went into the account were for property purchased, but the whole was properly treated as money paid into the agent's hands for the property, as it should have been paid for at the time the property was purchased, and as it should have gone into the account if the account had been properly kept. It was in the consideration of the court a trust fund, treated as though it was actually received at the time and in the manner it should have been received.

There was no such ambiguity or inconsistency in the special finding of facts as made the granting of a *venire de novo* proper, nor can we say, in the absence of the evidence, that the motion for a new trial was not properly overruled.

Upon the fullest examination of the whole record, and a careful consideration of all the points made on both sides, we are persuaded that justice was substantially accomplished, and that it would be impossible to arrive at a better result than that already reached.

As we find no error, the judgment is affirmed, at the appellant's costs.

NOTE.—*An Agent Employed to sell Cannot sell to Himself, and an Agent Employed to buy Cannot Purchase of himself.*—A sale is a contract[1] and a contract is an agreement between two or more parties for the doing or not doing of some particular thing.[2] From the very nature of the thing an agreement and concurrence of the minds of the parties, or a consent and harmony of their intentions is essential to the validity of every contract. Hence one mind cannot make a contract.[3] The rule above laid down applies not only to agents[4] but also to trustees[5] and executors,[6] administrators,[7] one of several administrators,[8] guardians,[9] attorneys,[10] stewards,[11] partners,[12] insurance agents,[13] brokers,[14] commission merchants,[15] assignees,[16] sheriffs,[17] deputy sheriffs,[18] judges of probate at sales ordered by themselves,[19] superintendents of public instruction authorized to sell school lands,[20] commissioners in bankruptcy,[21] county treasures at sales of lands for delinquent taxes,[22] cashiers,[23] broker's clerks,[24] attorneys' clerks,[25] presidents of insurance companies,[26] officers of railroads,[27] masters of ships,[28] a minority of a board of directors,[29] an attorney for a

1 Benjamin on Sales, 1.

2 Parsons on Contracts, Vol. 1, p. 6.

3 Lloyd v. Colston, 5 Bush. 590.

4 Reed v. Warner, 5 Paige, 656; N. Y. Cent. Ins. Co. v. Nat. Prot. Ins. Co., 14 N. Y. 85; Grumley v. Webb, 44 Mo., 444.

5 Green v. Winter, 1 John. Ch. 26; Davone v. Fanning, 2 John. Ch. 257; when the property was sold at auction to a third party for the benefit of the wife of the trustee; Oliver v. Court, 8 Price, 170; Whichcote v. Lawrence, 3 Ves. 740.

6 Rogers v. Rogers, 1 Hopk. 524; where the executor purchased at a sheriff's sale. Schenck v. Dart, 22 N. Y. 420; Beeson v. Beeson, 9 Burr, 279; Winter v. Geroe, 5 N. J. Eq. 319; Bailey v. Robinson, 1 Gratt. Va. 4; Hudson v. Hudson, 5 Munf. Va. 180; Bruch v. Lautz, 2 Rawle, 392; Dunlap v. Mitchell, 10 Ohio, 117; Williams v. Marshall, 4 Gill & J. 376; Terwilliger v. Brown, 44 N. Y. 240.

7 Beaubien v. Poupard, Har. Ch 206; where the brother in-law purchased at the administrator's sale. Hoffman v. Harrington, 28 Mich. 106; Sheldon v. Rice, 30 Mich. 301; Dwight v. Blackmar, 2 Mich. 330; Obert v. Hummel, 3 Harr. N. J. 74; Coat v. Coat, 63 Ill. 73; Kruse v. Stephens, 47 Ill. 112; where auctioneer bought in his own name for the administrator. Forbes v. Halsey, 26 N. Y. 53; where administrator bought through an agent. Woodruff v. Cook, 2 Edw. Ch, 259; Green v. Sargent, 23 Vt. 466; Drysdale's Appeal, 14 Pa. St. 531; Smith v. Drake 23 N. J. Eq., 302; in this case suit was commenced seventeen years after the eldest son came of age.

8 Ward v. Smith, 3 Sand. Ch. 592.

9 Bostwick v. Atkins, 3 Comst. N. Y., 53; Walker v. Walker, 101 Mass. 169; Wyman v. Hooper, 2 Gray, 141.

10 Condit v. Blackwell, 7 C. E. Green, 481; Hesse v. Briant, 6 DeG. M. & G. 623; Cane v. Allen, 2 Dow. 294; Harris v. Tremenheere, 15 Ves. 34; Greenwood v. Spring, 54 Barb. 375.

11 Selsey v. Rhoades, 2 Sim. & Stew. 49; in this case the bill was dismissed. Lord Hardwicke v. Vernon, 4 Ves. 411.

12 Dunne v. English, L. R. 18 Eq. 524; Dunlap v. Richards, 2 E. D. Smith, 181; Maddeford v. Anstwick, 1 Sim. Ch. 89.

13 N. Y. Central Ins. Co. v. Nat. Prot. Ins. Co. 14 N. Y. 85; Utica Ins. Co. v. Toledo Ins. Co. 17 Barb. 134.

14 Rothschild v. Brookman, 5 Bligh, N. S. 165.

15 Beal v. McKlernan, 6 La. 407.

16 *Ex parte* Lacey, 6 Ves. 625. In this instance another sale was directed; the premises to be put up at the price he gave; and, if no more bid, his purchase to stand. He bought them in at a lower price. *Quaere*, how is the assignee to be charged as to that difference?

17 Lazarus v. Bryson, 3 Bin. 54.

18 Perkins v. Thompson, 3 N. H. 144.

19 Walton v. Torrey, Har. Ch. 259.

20 Ingerson v. Starkweather, Walk. Ch. 346.

21 *Ex parte* Bennett, 10 Ves. 384.

22 Clute v. Barron, 2 Mich. 192; Pierce v. Baughman, 14 Pick. 346.

23 Torrey v. Bank of Orleans, 9 Paige, 663.

24 Gardner v. Ogden, 22 N. Y. 327.

25 Hobday v. Peters, 28 Beav. 349.

26 Fisher v. Budlong, 10 R. I. 527.

27 Aberdeen R. R. Co. v. Blaskie, 1 McQueen, 461; Flint & P. M. R. R. v. Dewey, 14 Mich. 477; Wardell v. U. P. R. R. Co. 5 Cent. Law Jour. 527.

28 Church v. Marine Ins. Co. 1 Mason, 341, where the master sold the ship at public auction. Barker v. Marine Ins. Co. 2 Mason, 369; Copeland v. Mercantile Ins. Co. 6 Pick. 198.

29 People v. Township Board of Overyssel, 11 Mich. 222.

majority of the creditors,[30] directors,[31] auctioneers,[32] superintendents,[33] corporations,[34] assignees.[35] In fact the rule extends to all persons in whom a special trust and confidence has been reposed.[36] In an Ohio case the court say "there was in effect, a sale by a trustee to himself, or to his own use and benefit. This, equity will never permit, not even where there is good faith and an adequate consideration." "Nothing is better settled in equity, than that such a transaction, on the part of a trustee, does not bind the *cestui que trust*."[37]

A Trustee Dealing with a Cestui Que Trust is Bound to use the Utmost Good Faith and to Make a full Disclosure.—Each man must know the circumstances under which he is dealing. If one of the parties is in a situation which is not fairly disclosed to the other, which if the other had known, he would not have relied on his judgement or advice, nor have acted upon or adopted any act of his, such a transaction ought not to be allowed. An equality of condition is a circumstance that is abolutely essential to any bargain.[38] If an attorney or agent can show he is entitled to purchase property, yet if instead of openly purchasing it, he purchases it in the name of a third person without disclosing the fact, such purchase is void.[39] A general land-agent is bound if he purchase any of the estates of which he is agent to communicate to his principal all his knowledge of the real value of the estate, and to give the same advice as if the sale had been to a third party.[40]

A Settlement, When the Principal is Ignorant of his Rights, will be set Aside.—A concealment of a material fact is sufficient to avoid a release obtained by a party whose duty it was to disclose.[41] An adjustment is not binding on an underwriter, although at the time of signing it he had the means of rendering himself acquainted with the history of the voyage and the manner of the loss, if his attention was not drawn to circumstances he afterwards learns, by which the underwriters were discharged.[42] The agreement of a partner, who superintends exclusively the accounts of the concern and who keeps his co-partner in ignorance, to purchase his co-partner's share for an inadequate consideration, will be set aside.[43] A confirmation to be available must be by a person acquainted with his rights, and knowing that the transaction was impeachable.[44]

Any Undue Concealment or Non-Disclosure of Facts Which an Agent is under a Moral Obligation to Disclose is a Fraud on the Principal.—In a Rhode Island case, where the president of an insurance company, who professed a desire to aid a stockholder in selling his stock, advised and effected a sale thereof at a certain price and caused the transfer to be made to a third person, whom the stockholder supposed to be the purchaser, but who really took it for the president and afterwards transferred it to him, it was held that the president was liable to the stockholder for the difference between the real value of the stock and the price for which it was sold.[45] An agent must communicate all he knows relative to the property; and if any reasonable doubt can exist the transaction cannot be sustained.[46] Courts of equity will open and examine accounts after any length of time in respect of fraud.[47]

An Agent cannot be Secretly Instructed Adversely to his Principal.—H. & B. were clients of the same solicitor, M. to whom B. gave an authority in writing to sell certain property. M. agreed with H. to sell the property to him. Held, that this was a transaction in which there was a necessity for the utmost openness of dealing, and the court not being satisfied that it existed in this case refused specific performance of the agreement.[48] A broker employed to sell or exchange property, cannot properly act for a customer; and, if he exacts from a customer a conditional promise of compensation, he cannot recover any compensation from the owner for services, although a sale or exchange is effected with such customer.[49] Neither could he collect any compensation from the customer.[50]

An Agent Cannot Act for Two Conflicting Principals.—In the case of the Panama and South Pacific Telegraph Company v. India Rubber, Gutta Percha, and Telegraph Company, Sir W. M. James, L. J., lays down the principal that any surreptitious dealing between one principal to a contract and the agent of the other principal is a fraud in equity, and entitles the first named principal to have the contract rescinded, and to refuse to proceed with it any shape.[51] And in a Pennsylvania case, Chief Justice Thompson says: "We have the authority of Holy Writ for saying that: 'no man can serve two masters; for either he will hate the one and love the other, or else he will hold to the one and despise the other.' All human experience sanctions the undoubted truth and purity of this philosophy, and it is received as a cardinal principal in every system of enlightened jurisprudence."[52] A broker acting for both parties in effecting an exchange of property can recover compensation from neither, unless his double employment was known and assented to by both.[53]

A director of a joint stock company is in a fiduciary position towards the company, and if he makes any profit on account of transactions of business when he is acting for the company, he must account for them to the company. So, if, acting for himself, he proposes to the company a contract from the execution of which he will derive a profit, that profit belongs to the company.[54]

An Agent Selling to Himself Must Account for any Surplus.—So, where an agent, authorized to sell a tract of land at a given price, sold a portion of it for a larger sum and placed the legal title to the residue

[30] Hawley v. Cramer, 4 Cow. 717.
[31] Cook v. Burlin Co. 43 Wis. 433; N. Y. Cent. Ins. Co. v Nat. Prot. Ins. Co. 14 N. Y. 85.
[32] Oliver v. Court, 8 Price, 170.
[33] Cook v. Burlin Co. 43 Wis. 433.
[34] Banks v. Judah, 8 Conn. 146, where a corporation sold its property to a majority of its members. Wilbur v. Lynde, 49 Cal. 290, where a corporation gave its note to its trustees.
[35] *Ex parte* Lacey, 6 Ves. 626.
[36] Rankin v. Porter, 7 Watts, 387.
[37] Godin v. Cincinnati & Whitewater Canal Co. 18 Ohio St. 169.
[38] Rothschild v. Brookman, 5 Bligh, 197.
[39] Lewis v. Hillman, 3 H. of L. Cas. 607.
[40] Cane v. Allen, 2 Dow, 289.
[41] Bowles v. Stewart, 1 Sch. & Lef. 209.
[42] Shepherd v. Chewter, 1 Camp. 274.
[43] Maddeford v. Anstwick, 1 Sim. 90.
[44] Dunbar v. Tredennick, 2 Ball & B. 304.
[45] Fisher v. Budlong. 10 R. I. 525; Laidlaw v. Organ, note, 2 Wheat. 178.
[46] Lady Ormond v. Hutchinson, 16 Ves. 107.
[47] Beaumont v. Boultbee, 5 Ves. 485.
[48] Hesse v. Bricht, 6 DeG. M. & G. 623.
[49] Walker v. Osgood, 98 Mass. 348.
[50] Raisin v. Clark. 41 Md. 158.
[51] P. & S. P. T. Co. v. I. R. G. P. & T. Co. L. R. 10 Ch. Ap. 515.
[52] Everhart v. Searle, 71 Pa. St. 259; Kimber v. Barber, L. R. 8 Ch. Ap. 56; Farnsworth v. Hemmer, 1 Allen, 494; Pugsley v. Murray, 4 E. D. Smith, 245; Walker v. Osgood, 98 Mass. 348; Raisin v. Clark, 41 Md. 158; Fish v. Leser, 69 Ill. 394.
[53] kice v. Wood, 113 Mass. 133.
[54] Liquidators v. Coleman. L. R. 6; E. & I. App., Cas. 189.

for his own benefit in a third party, it was held that the residue should be released to the principal and that the agent should account for the excess received for the portion sold.[55] And if an agent authorized to sell at a fixed price sells for a higher price, he must account to his principal for the excess.[56] And where an agent purchases land for his principal, if the agent represents that he paid a larger sum than he actually did, he must account to the principal for the difference between the sum he paid and the sum he received from the principal.[57]

An Agent, his Agency being Ended, May deal with the Principal.—In a note to Fox v. Macreth,[58] the reporter says: "the result of the cases seems now to be that a purchase by a trustee for sale of the trust property may always be set aside and that it is not incumbent upon the party to show an advantage gained by such trustee.[59] He may purchase, however, if he completely divest himself of the character of trustee, and contract with the *cestui que trust*, the latter being fully apprised of every material fact."[60] And where a principal, after a full knowledge of all the circumstances, deliberately ratifies the act of the agent, or acquiesces in it for a great length of time, it will become obligatory upon him; not by its own intrinsic force, but because he waives the protection given by the law and deals with the agent as a person, *quoad hoc*, discharged of his agency.[61]

Executors using their Testators' Assets will be Charged with Profits if any are Made.—An executor acting with regard to the testator's property in any other manner than the trust requires is answerable for any gain and is liable for any loss.[62] That the parties whose funds have been misapplied, should, in every case have their option of receiving the actual profits made or interest according to circumstances, appears a rule exposed to no serious objection. And although the court may allow compound interest, yet this seems, generally speaking, much less advisable than an account of actual profits.[63]

A Deed Obtained by Fraud, Creates a Trust and the Trust may be Proved by Parol Evidence.—In cases of a joint purchase where each purchaser is to have an interest in proportion to his advances, parol evidence is admissible to establish the trust, as well as to rebut, control or vary it. It is a fraud for an agent to avail himself of his confidential relation to drive a bargain or to create an interest adverse to that of his principal in the transaction, and that fraud creates a trust, even when the agency must be proved only by parol. The statute of frauds is never allowed as to protection to frauds or as a means of seducing the unwary into false confidence to their injury.[64]

A Party Rescinding a Contract, Must Return the Consideration Received.—A sale procured by fraud is not absolutely void. The defrauded party has his option to avoid or affirm the sale. But if he designs to rescind the contract, he must restore the parties to the condition in which they were at the time of the sale.[65] Provided he does so at the earliest moment after discovering the fraud.[66] And he must restore or offer to restore all he has received under the contract. He cannot rescind in part and affirm as to the residue, even where the sale is of several articles at distinct prices for each.[67] But where the party who practiced the fraud has entangled and complicated the subject of the contract, so as to render it impossible that he should be restored to his former condition, the injured party may rescind the contract by doing whatever is in his power to annul what has been done.[68]

The Statute of Limitations is Generally a bar in Equity, But it does not Run against a Trust unless it be a mere Constructive Trust.—The statute of limitations in a good plea in equity as well as at law,[69] but it does not apply to trusts as long as the relation of trustee and *cestui que* trust exists between the parties.[70] But as to cases of merely constructive trusts, created by courts of equity, or cases which in a sense are treated for some purposes as implied trusts, to which, however, legal remedies are applicable, the doctrine cannot be admitted that the statute of limitations does not embrace them.[71]

T. D. HAWLEY.

Detroit, Mich.

55 Kerfoot v. Hyman, 52 Ill. 512.
56 Merryman v. David, 31 Ill. 404.
57 Ely v. Hunford, 65 Ill. 267; Cottom v. Holliday, 59 Ill. 177.
58 Fox v. Macreath, 10 H. of L. Cases, 329.
59 *Ex parte* Lacey, 6 Ves. 627.
60 Coles v. Trecothick, 9 Ves. 234; Davone v. Fauning, 2 Johns. Ch. 256.
61 Note to Whichcote v. Lawrence, 3 Ves. 740.
62 Piety v. Stace, 4 Ves. 620.
63 Palmer v. Mitchell, 2 Myl. & K. 673.
64 Jenkins v. Eldredge, 3 Story, 185.
65 Matteawan Co. v. Bently, 13 Barb. 641.
66 Devendorf v. Beardsley, 23 Barb. 656.
67 Voorhees v. Earl, 2 Hill, 288.
68 Masson v. Bovet, 1 Denio, 69.
69 Bangs v. Hall, 2 Pick. 372.
70 Hemmenway v. Gates, 5 Pick. 321; Butler v. Hascall, 4 DeSaus, 706.
71 Robinson v. Hook, 4 Mason, 153.

WEEKLY DIGEST OF RECENT CASES.

1. ACTION—*When Transferee May not Bring Action in his own Name on "Labor Tickets."*—The printed certificates sued on in this case, issued by the defendant corporation, or by its authority, and denominated "labor tickets," being made payable on their face "to employes only," and indorsed "not transferable," will not support an action by an assignee in his own name. The opinion of the court, delivered by Somerville, J., says: "The certificates show on their faces that they are payable to the employes only, and to no one else. They are expressly declared to be not transferable, which negatives any promise of defendant, otherwise implied, that payment would be made to any assignee or transferee of the holders. They were issued with this express understanding, which was assented to by the employes when they received them, and the plaintiffs took the instruments with full notice of this restriction because it appeared on the face of the paper. The transferability of the paper was thus destroyed by the con-

sent of the original parties to it. Durr v. State, 59 Ala. 24." *Tabler, Crudup & Co. v. The Sheffield Land, Iron and Coal Co.*, S. C. Ala., December Term, 1885-86.

2. ATTORNEY AND CLIENT—*Good Faith.*—An attorney, when acting for his client, is bound to the most scrupulous good faith. If he corruptly sells out his client's interest to the other side, a judgment thus obtained may be set aside on the charge of fraud. So, also, if a plaintiff is guilty of so influencing the attorney of the defendant, by the payment of money, without the knowledge or consent of his client, as to make it the interest of said attorney that plaintiff should obtain a judgment against his client, and such attorney, in the absence of his client, does not make any resistance to the rendition of the judgment in favor of the plaintiff, a new action may be sustained by the defendant to set aside the former judgment and open the case for a new and fair hearing. *Haverty v. Haverty*, S. C. Kans., July 9, 1886; Kans. L. J., Vol. 3, No. 23.

3. COMITY—*Attachment — Insolvency.* — Creditors resident in a State which has enacted a system for an equal distribution of the assets of an insolvent, and who are bound by the decree establishing the insolvency, should be restrained from seeking a preference by attachment of the debtor's property in another State. The courts of a State would not sustain the claim of attaching creditors not citizens of the State whose process is invoked, in preference to the claim of an assignee obtaining title under the laws of the State of the insolvent debtor. Although the property of a debtor was attached in another State before the assignment in insolvency was actually executed, yet if done with full knowledge that the debtor was embarrassed and had suspended payment, and with intent on the part of the attaching creditors to avoid the effect of the assignment, it is ineffectual to establish a preference over creditors resident in the same State as the insolvent. *Cunningham v. Butler*, S. Jud. Ct. Mass., May 11, 1886; 2 New Eng. Rep. 338.

4. COMMERCIAL LAW—*Action on Promissory Note Indorsement—Denial Under Oath—Evidence.*—In an action brought to recover upon a promissory note payable to order, by a party claiming to be the indorsee, the answer admitted the execution of the note, but denied the written indorsement thereon by affidavit duly verified; it admitted, however, that the note had been transferred to the plaintiff, and the defense was that the transfer was made after maturity, and that there had been a total failure of consideration for the note. *Held.* The plaintiff is entitled to a judgment as being the holder and in possession of the note, unless the defense of the failure of consideration is established; but, held further, the plaintiff is not protected as a *bona fide* holder of the note, so as to cut off the equities of the maker, in the absence of proof of the execution of the written indorsement, denied under oath. *State Sav. Assn. v. Barber*, S. C. Kans., July 9, 1886; Kans. L. J. Vol. 3, No. 23.

5. COMMON CARRIER—*Duty of Railroad to Stop at Platform—Evidence*—Where the complaint, claiming damages of a railroad company for the refusal of a conductor to stop his train, and put plaintiff off at the proper station, alleges that he "willfully refused to stop," and carried her several hundred yards beyond, "without her consent, and against her protest;" these averments are material, and if the evidence shows that the conductor only neglected to stop, or that the plaintiff not only submitted, but consented to alight at the further place, without objection or protest, there is a fatal variance between the averments and the proof. If the defendant's trains were accustomed to stop at the platform at which the plaintiff desired to alight, though it was not owned or constructed by the company, an implied contract that passengers might stop there may be inferred. *Louisville, etc. Co. v. Johnson*, S. C. Ala.

6. CONTRACT—*Time—Proposition by Mail—Acceptance.*—Where a proposition to enter into a contract is made, and no time of acceptance is fixed by the party proposing, it must be accepted within a reasonable time. Where a proposition to sell a stock of merchandise is made to a distant party by letter, in which he asks for an early response, the proposer has a right to expect a prompt reply through the mail, which is the usual mode of accepting an offer made by letter, or else by some other equally expeditious manner. A mere uncommunicatdd purpose to accept an offer does not constitute an acceptance, and where parties are distant and the contract is to be made by correspondence, the writing of a letter or telegram containing a notice of acceptance, is not of itself sufficient to complete a contract. In such a case the act must involve an irrevocable element, and the letter must be placed in the mail, or the telegram deposited in the office for transmission, and thus placed beyond the power or control of the sender, before the assent becomes effectual to consummate a contract; and not then, unless the offer is still standing. The mere determination to accept an offer received by letter, and the act of the party to whom it is made, in starting on a journey with the intention of meeting the proposer and accepting the offer, where no notice of his intention is sent to or received by the proposer within a reasonable time, is no more than a mere mental assent, and does not amount to an acceptance. *Trounstine v. Sellers*, S. C. Kans., July 9, 1886; Kans. Law J., Vol. 3, No. 23.

7. CORPORATION—*Municipal Corporations—Special Assessment—Benefits—Instruction as to Damages—Derivable Only at Expense Equaling Value.*—An instruction directing the jury to ascertain the depreciation in value, if any, caused to certain property by a certain improvement, implies a calculation both of damages and benefits, and is not faulty as excluding benefits from the consideration of the jury. Where the evidence shows that property might derive a benefit from an improvement if a sum greater than its entire value were expended upon it in putting it into a condition to receive such benefit, a failure to instruct the jury to deduct the benefits to such property from the damages is not clearly erroneous. *Village of Hyde Park v. Washington Ice Co.*, S. C. Ill., May 15, 1886, 7 N. East. Rep., 523.

8. CRIMINAL LAW—*Burglary—Possession of Stolen Money—Evidence—Trial—Reasonable Doubt.*—The mere fact of one of two parties indicted for burglary being in possession of money identical in kind and denomination with that which was stolen is not sufficient evidence to convict him, in the absence of proof that he knew the money to have been stolen when he received it, or was connected with the commission of the crime. State v. Nelson, 11 Nev. 340, in regard to instructions as to reasonable doubt, affirmed. *State v. Jones*, S. C. Nevada, July 12, 1886, 11 Pac. Rep. 317.

9. ———. *Homicide—Manslaughter—Unlawful Act—Deadly Weapon—Carelessness—Instruction—Reasonable Doubt—Definition—Verdict—Informal—Sufficiency of.*—Where one chases another with intent to catch him, and slap his face, and draws a pistol with intent to fire in the air, and scare the fugitive, and accidently shoots and kills him, the offense is manslaughter. Campbell, C. J., and Morse, J., dissent. An instruction defining "reasonable doubt" as "a doubt arising out of the facts and circumstances of the case, in maintaining which you can give some good reason," while not accurate, was not of sufficient consequence in this case to be assigned as error. Where the jury reported to the court that they found the respondent guilty of voluntary manslaughter, and the verdict was reduced to form, and the clerk then said: "Gentlemen of the jury, you say you find the respondent, Jacob Steubenvoll, guilty of manslaughter in manner and form as the people in their information charged—so say you, Mr. Foreman; so say you all?" and the jury answered, "We do;" *held*, that the verdict was sufficient. *People v. Steubenvoll*, S. C. Mich., July 8, 1886, 28 N. W. Rep. 883.

10. ———. *Larceny and Receiving Stolen Goods—Indictment—Proof Must Agree With Allegations of Larceny—Embezzlement of Proceeds From Authorized Sale, not a Larceny of Thing Sold.*—The indictment against defendant charged that he "did steal, take and carry away one lace-pin, of the value of eight hundred dollars, * * * the property of James Porteous." The evidence was that Porteous had left it with defendant to be sold, but the former had authorized him to procure a loan upon it, which he did. Defendant asked the court to charge that "the indictment being for the larceny of a certain pin, if the jury believe that the complainant, being the owner of the pin, authorized the defendant to obtain a loan upon it, and the defendant did actually obtain the loan as authorized, they cannot convict under the indictment for the larceny of the pin." The court refused to so charge. *Held* error. An omission to account for the proceeds of a loan obtained on a pin which accused was authorized to pawn, could not, by relation, change the voluntary act of the owner in parting with the pin, into a larcenous taking by the defendant, nor support the allegation of the indictment. *People v. Cruger*, N. Y. Ct. Appls., June 1, 1886, 7 N. E. Rep. 555.

11. ———. *New Trial—Newly-Discovered Evidence—Jury—Challenge for Cause—Exception—Witness—Examination of—Practice—Leading Questions—Evidence—Dying Declarations—Evidence Explaining—What Admissible—Error—Evidence—Exclusion of—Error Without Injury—Credibility of Witness.*—In cases of conflicting testimony, newly-discovered evidence, merely cumulative, will not furnish ground for a new trial. A challenge to a juror on the ground that he is not a resident of the county where the trial of a criminal case is had, is a general challenge for cause, and no exception to the action of the court in disallowing such a challenge is permitted by statute. On the examination of a witness, counsel is not authorized to insert in a question a statement as having been made by the witness which had not in fact been made by him. The allowance of a question to a witness, against the objection of the adverse party that it is leading, improper, and incompetent, cannot be assigned as error on appeal, the matter of the form of a question being in the discretion of the trial court. Testimony relating to the condition of a witness when his alleged dying declaration was made, is not testimony adding to or contradicting the written statement. Dying declarations are restricted to the act of the killing, and to circumstances immediately attending it, and forming a part of the *res gestæ*. The action of a court in sustaining the objection to a certain question cannot be assigned as error, if elsewhere in the course of the trial the question has been fully answered. On a trial for murder, it is not error to refuse to admit a question put to a witness as to whether he knew of the defendan't arrest for arson, and at whose instigation such arrest was made, if no offer was made to prove that the arrest for arson was instigated or brought about by any witness for the prosecution, or any organization or society hostile to the defendant with which any witness for the prosecution was connected; as in the absence of evidence, or any offer thereof, connecting the witness for the prosecution with such arrest, the answer to the question could not have tended to destroy the credibility of any of them. *People v. Fong Ah Sing*, S. C. Cal., May 31, 1866, 11 Pac. Rep. 323.

12. DESCENT AND DISTRIBUTION—*Will by Minor—Guardian's Sale.*—G., while an infant, inherited from her father and mother real estate belonging to them during their lives in equal moieties as tenants in common. Her guardian sold her said estate, under leave of the court of probate. She died November 21, 1885, 19 years old, leaving a will dated that day, purporting to convey her estate, consisting of the surplus proceeds of the above real estate. Under Pub. St. R. I. c. 182, §§ 1, 2, minors of 18 can dispose of their personal estate by will, but only those of full age can dispose of their real estate by will. Under Pub. St. R. I. c. 179, § 14, if real estate of a ward is sold by guardian by leave of a probate court, the surplus remaining at the death of the ward descends to the heirs of such ward, as the real estate of the ward would have done had no sale been made. *Held*, this clearly means that the conversion of the real estate into money shall not alter the course of descent. *Held, also*, since the will would have been ineffectual to interrupt the descent if the real estate had not been sold, it is likewise ineffectual, notwithstanding the sale as to the surplus proceeds. *Held*, that the surplus proceeds will descend in moieties, according to the canons of descent, one-half to the next of kin of the deceased of the blood of the father, and the other half to the next of kin of the blood of the mother. *In Re McCabe*, S. C. Rh. Isl., June 19. 1886, 5 Atl. Rep. 79.

13. DIVORCE—*Fraud in Procuring Divorce; Review.*—Where an action is commenced by a defendant within six months after the rendition of a decree of divorce, to vacate the same, upon the charge of the fraud of the plaintiff, and in such case a judgment is rendered against the defendant, a subsequent proceeding to review said judgment may be commenced in the supreme court within one year after its rendition. (Sec. 3, ch. 126, Session Laws of 1881.) *Haverty v. Haverty*, S. C. Kans., July 9, 1886, Kans. Law J., Vol. 3, No. 23.

14. DOWER—*Rents and Profits—Alienation of Dower Interest—Equity.*—Until her dower is assigned

to her, the widow has no interest which she can convey to a stranger, so that he may assert it at law, and the heir may recover in ejectment against her grantee; but a court of equity will protect the rights of her alienee, when founded on a valuable consideration, and enforce the transfer against her in a proper case. Where the widow joins with two of the heirs in conveying the lands to a third person, to whom the other heirs had already alienated, the deed being founded on valuable consideration, and containing covenants of warranty, she cannot afterwards maintain a bill in equity against her grantee for assignment of dower. Where the widow, residing with her sons on the homestead lands, before dower has been assigned to her, unites with them in a mortgage of the lands and crops, as security for advances to enable them to make a crop, and the cotton raised is delivered to the mortgagees in payment of the debt, she cannot afterwards maintain a claim against them as for rents and profits before dower as signed. *Reeves v. Brooks*, S. C. Ala.

15. *Equity—Bill to Quiet Title — Fraud — Sale by Guardian.*—Where a guardian sells lands without proper formalities, and the wards, after attaining their majority, presumptively affirm the sale by retaining the purchase money, and later actually do so by giving the owner of the title under the probate sale a deed of the property, he may maintain a bill in equity to quiet title against a third party who, by fraud, obtains a deed of the wards after their majority, and before they execute the deed to complainant. *Fender v. Powers*, S. C. Mich. July 1, 1886. 28 N. W. Rep., 878.

16. *Fixtures — Landlord and Tenant — Machinery, when a Fixture — Execution against Landlord — Conversion—Demand.*— Machinery attached to a building with bolts and screws is a fixture, within the meaning of § 660 of the California Civil Code. Machinery having the character of a fixture may be taken on execution against the owner of the property to which it is attached, notwithstanding it belonged to, and was attached to the realty by, a tenant whose lease has not expired, and who, under the lease, has a right, upon the expiration thereof, to remove such machinery. No demand is necessary before bringing suit for the recovery of property which constituted a fixture, and which was wrongfully severed and removed. *McNally v. Connolly*, S. C. Cal. May 28, 1886. 11 Pac. Rep., 320.

17. FRAUDULENT CONVEYANCES — *Post-Nuptial Settlements — Evidence — Husband and Wife — Proving Consideration—Recital in Deed.*—A Husband is not a competent witness to prove the consideration upon which a post-nuptial settlement upon his wife was made, even though the wife be dead. In equity the consideration for a post-nuptial settlement may be shown by parol proof. A recital in the deed, that the consideration was paid by the husband, does not necessarily imply anything more than the money passed through his hands; it does not at all indicate the ownership thereof. A case in which the evidence satisfactorily shows that the consideration for the settlement upon the wife moved not from the husband, but from the wife's father, and the settlement is sustained. *Marks v. Spencer*, S. C. of App. Va. April 22, 1886. Va. L. J. Vol. 10, 463.

18. GUARDIAN AND WARD—*Account of Guardian—Expenditure without Order of Court — Repairs — Subsequent Ratification.*—A guardian expended certain sums of money judiciously and in good faith in repairs which resulted to the advantage of the estate, and although there was no order of court previously made authorizing the expenditure, yet when his account was presented to the court it was decided that he was justified in making the repairs. *Held*, that the guardian having taken the risk of being surcharged, yet the subsequent approval by the court relieved him from liability. *Kilpatrick's Appeal*, S. C. Penn., May 10, 1886. 5 Alt. Rep. 10.

19. LANDLORD AND TENANT—*Ejectmdnt.* — Where the husband of the defendant occupied the premises in controversy, as a tenant by the year, and defendant, after his death, continued in possession of the premises with the knowledge of the plaintiff, who made no objection to her occupancy, and by his silence and his acts consented to it, she may be regarded as a tenant at will, and, being lawfully in possession, ejectment will not lie against her until after demand of possession. *Perkins v. Perkins*, S. C. Conn., April 24, 1886. 2 N. Eng. Rep., 311.

20. MARRIED WOMEN—*Disabilities of Coverture—Powers Conferred when Relieved of*—A decree of the chancellor, relieving a married woman of the disabilities of coverture as to her statutory or other separate estate (Code, § 2731), although it does not confer on her a general power to contract, expressly authorizes her to "buy" and "to be sued as a *femme sole*;" and she is personally bound by a contract of purchase made by her and may be sued at law. In rendering the opinion of the court, upon this point, Somerville, J., says: "It is our opinion that she was personally bound by her contract of purchase. No one contends that the purpose of the statute was to confer on married women a general power to contract. The contrary has been uniformly declared in all of the decisions of this court where the construction of this law has been under our review. Ashford v. Watking, 70 Ala. 156; Meyer v. Sulzbacker, 76 Ala. 121; Cohen v. Wollner, 72 Ala. 233; Hatcher v. Diggs, 76 Ala. 189; Dreyfus v. Wolffe, 65 Ala. 496. * * * The statute confers on her the express power to buy. This includes the power to buy on credit, and, by necessary implication, the incidental power to promise to pay for what she buys, because her authority is not confined to buying for cash. Then follows the declaration in the statute that she may be sued as a *femme sole*—that is, just as she could be sued if she were unmarried, or had no husband. In the latter contingency it is perfectly clear that the result of a suit, in the event of a recovery, would be a personal judgment against her." *Parker v. Roswald*, S. C. Ala. Dec. Term, 1885-86.

21. PARENT AND CHILD—*Step-Father—Step-Child—Support of Minor Child—Contract, Express and Implied—Guardian and Ward—Liability of Guardian — Advice of Counsel — Surcharge.*— A stepfather is under no legal obligation to support a step-child. If, however, the latter enter into and form a part of the former's family, the law will imply no promise to pay for his doing; but this rule is changed by an express promise to pay. A guardian who has acted according to his best light, under the advice of counsel, and in good faith, will not be surcharged for sums of money expended for the benefit of his wards. *Brown's Appeal*. S. C. Penn. April 5, 1886. 5 Atl. Rep. 13.

22. PARTITION—*Procedure in Adverse Claim.* — In an application for the sale of property, for division or distribution among several tenants in common, as in an application for partition (Code, §§3498, 3515), the petition must set forth the names and residences of "all the parties interested in the property;" and this statutory requirement, which is jurisdictional, includes the person who files the application. If the petition shows that one of the tenants in common has died, it must show to whom his interest has descended, or in whom it has become vested, and such persons must be made parties. If it appears that the deceased tenant owed debts at the time of his death, the court should appoint an administrator *ad litem* to protect the creditors (Code, § 2625); but such administrator is not authorized to receive the money decreed to him. Although a partition or sale can not be decreed, "where an adverse claim or title is asserted by any one" (Code, § 3512); yet the jurisdiction of the court can not be ousted, or rendered nugatory, by the false assertion of an adverse claim by one of the defendants, without foundation in law or in fact. The surviving husband of a deceased married woman who was one of the tenants in common, having a statutory life estate in his wife's interest in the lands (Code, § 2714), is a proper and necessary party to the proceeding, and is bound by a decree ordering a sale; but, as to how his interest in the proceeds of sale is to be ascertained and determined, in the absence of the statutory provisions, the court decides nothing. *Ballard v. Johns*, S. C. Ala.

23. PARTNERSHIP.—*Members of Proposed Corporation—Contract with One of Its Members—Form of Action—Case—Bill in Equity—Account Render.* —The members of a proposed corporation are partners liable to contribute, in proportion to their interest, to funds required for the use of the partnership, and entitled to a proportionate share of profits realized. A member of a proposed corportion, who is treated as a partner, cannot bring an action on the case against the other members to recover damages for failure to perform a contract for the purchase of property for firm purposes into which they have entered with him. One partner cannot sue another partner for a partnership debt, except by bill in equity, or action of account render. *Crow v. Green*, S. C. Penn., April 26, 1886. 5 Atl. Rep. 23.

24. STRANGER PAYING DEBT.—*Subrogation—Request to pay—Mortgage—Administrator.*—Where a mere stranger, a mere volunteer, a mere intermeddler, pays the debt of another, he cannot be subrogated to the rights of the creditor. But where a person pays a debt which is secured by a mortgage, at the instance and request of the debtor, with the agreement that the person paying the debt shall have a mortgage lien upon the real estate then mortgaged to secure such debt, and a new mortgage is given but is void, the party furnishing the money may be subrogated to the rights of the original creditor. And this rule applies where an administrator borrows money to pay a debt of his intestate's estate. In other words, where a debt is due against the estate of a deceased person, and such debt is secured by a mortgage on real estate of such deceased person; and the administrator, whose duty it is to pay such debt, borrows the money therefor from a third person, with the agreement and understanding between them that such third person shall be secured by a mortgage lien upon the previously mortgaged property of such estate, and for that purpose a mortgage on the previously mortgaged property is executed by the administrator to such third person, which mortgage is void because of a want of power in the administrator to execute the same, but in pursuance of such mortgage and with the agreement and understanding between the administrator and the loaner of the money, the money is loaned and is paid to the original mortgagee; *held*, that such third person may then be snbrogated to the rights of the original mortgagee. *Crippen v. Chappel*, S. C. Kans. July 9, 1886, Kans. L. J. Vol. 3 No. 23.

25. TAX.—*Title—Color of Title—Adverse Possession—Witness.*—Five years "after the date of the sale" is the statutory limitation to an action to recover land sold for non-payment of taxes (Code, § 464); and this has been construed to mean five years from the delivery and registration of a deed properly executed and acknowledged. A tax-deed, though invalid as a muniment of title, may constitute color of title, and thus operate to define the boundaries of an actual possession. A fence, or inclosure, is not an essential element of an adverse possession; and permitting a fence to become dilapidated, or even destroyed, during the interval between periods when necessary to protect the crops, does not, of itself, constitute an abandonment, nor interrupt the continuity of the possession. Although a witness may testify corruptly, his testimony should, nevertheless, be received as credible, so far as it may be satisfactorily corroborated by other evidence. *Hughes v. Anderson*, S. C. Ala.

26. WILL—*Specific Devise—Residuary Clause—Estoppel — Deed — Signature — Assumed Name.*—A residuary devise, in ordinary terms, carries with it not only the property of the testator in which no interest is devised or bequeathed in other portions of the will, but also reversionary interests in property not otherwise disposed of by him, even when the residuary devisee is also the devisee of the interest specifically devised as a life-estate. A party signing and executing a deed under an assumed name will be estopped from taking advantage of it, and so will all others in privity with him and whose rights are not paramount thereto. *Davis v. Callahan*, S. J. C. Me., June 22, 1886, 5 Atl. Rep. 73.

27. WITNESS—*Transactions With Decedents—Act of April 15, 1869—Competency of Witness—Trial—Testimony of Incompetent Witness—Striking Out—Error Cured—Trusts—Resulting Trusts—Payment of Purchase Money—Intention of Parties—Evidence.*—The act of April 15, 1869, forbidding the living party to a contract to testify in relation to it when the other party is dead, applies to suits upon choses in action only. It does not apply to actions involving title to real estate. Where a witness is competent when offered, and when afterwards, in the course of the trial, his incompetency appears, his testimony is stricken out, and the jury instructed to disregard it, its original admission is not error. Where a purchaser of real estate pays the purchase money, and takes title in the name of another, a presumption arises of a resulting trust in his favor. The intention of the parties governs in such a case, and their contemporaneous and subsequent acts and declarations may be admitted in evidence to rebut the presumption. *Warren v. Steer*, S. C. Penn., May 17, 1886, 5 Atl. Rep. 4.

QUERIES AND ANSWERS.*

[Correspondents are requested to draw up their answers in the form in which we print them, and not in the form of letters to the editor. They are also admonished to make their answers as brief as may be.—Ed.]

QUERIES.

15. A. offers to sell a lot for a certain price. B. replies: "I accept your offer, please execute the enclosed deed and send it to S. Bank with instructions to cashier to collect the amount due you and deliver deed. I will pay their charges, you will send with the deed an abstract of title, or if you have not one, please order one. If you prefer to send the deed to any one else, it does not matter much to me, only I do not want anything to do with a real estate agent." Is this an unqualified acceptance? Or do the requests to send it to S. Bank—subsequently modified—and for an abstract constitute new conditions? Please cite authorities. K.

16. A., a physician, gave to B. as collateral security, to secure to B. a running account not due, an order on C., who was indebted to A. B. immediately returns the order to A. for collection and agrees to give a credit when the order is collected and amount paid to him. The order was never accepted by C. and he knew nothing of it. Afterwards C. pays his account to A., and on demand from B., A. fails to pay the money so received from C. over to B. Is A. guilty of embezzlement? Cite authorities. J.

QUERIES ANSWERED.

Query 10. [23 Cent. L. J. 70].—A. loses his house which was insured, by fire. The insurance company believed that A. either did or procured the burning thereof, and refuses payment of loss. A. sues to recover the amount claimed under the policy. The company answers, setting up as their defense, A.'s guilt in regard to the fire. What is the quantity of proof required at the company's hands to release it from liability? Must it establish the guilt "beyond a reasonable doubt" as would be required of the State in a criminal prosecution for the crime, or must it simply show it by "the preponderance of testimony" only as is the rule in other civil cases.

Answer.—The defendant need only show A.'s guilt by a preponderance of the evidence. 2 Greenleaf on Evidence, § 408: Gordon v. Parmlee, 15 Gray (Mass.), 413: Wash. Union Ins. Co. v. Wilson, 7 Wis. 169; Schmidt v. Ins. Co., 1 Gray (Mass.), 529; Blaeser v. Ins. Co. 19 Am. Rep. 747. A. W. L.

Query 37. [22 Cent. L. S. 310.]—Section 5010, Rev. Stat. Mo., provides that the Board of Trustees may pass ordinances: "To provide licensing and regulating dram-shops and tippling houses, etc." Under this provision in said section, has the Board of Trustees power to pass an ordinance regulating the sale of liquor by druggists and pharmacists in the village? Please cite authorities. * * *

Answer.—Under the laws of Missouri a dram-shop keeper is one thing (2 Rev. Stat. 1069) and a druggist is another (2 Rev. Stat. 1075). By a familiar rule of construction the Board of Trustees under the authority stated can regulate snch establishments only as fall under the statutory definition of dramshops, but cannot regulate drug-stores, nor interfere with the business of a drug-store, which under the statute includes the sale of liquors in certain modes and quantities. If however, a druggist so conducts his business as to make his establishment fall under the legal definition of a dram-shop, he becomes amenable to the law and ordinances relative to dram-shops. A. B. C.

RECENT PUBLICATIONS.

A TREATISE ON CONTRACTS FOR FUTURE DELIVERY and Commercial Wagers, Including "Options," "Futures," and "Short Sales." By T. Henry Dewey, of the New York Bar. New York: Baker, Voorhis & Co., Publishers, 66 Nassau Street, 1886.

The subject of this work is of no slight importance to lawyers who are interested in commercial affairs, for, from the necessity of the case much of the business of their clients is speculative. It should, therefore, interest them to be able to distinguish clearly between those classes of contracts which, although confessedly speculative, are nevertheless legal and within the scope of legitimate commercial enterprise, and those which the law condemns as wagering contracts. The line of demarcation is not very distinct, the law, as the author of this work remarks in his preface "is far from being settled and the decisions in many cases are contradictory and unsatisfactory." It is the object of this work to classify and harmonize the numerous rulings, and to enable the practitioner to distinguish clearly, speedily and accurately between those classes of speculation which the law regards as legitimate enterprise, and those which it brands as wagering contracts, and mere gambling, and to the enforcement of which, it steadfastly refuses its aid.

As to whether a given transaction is lawful or unlawful, a legitimate speculation or a mere wager, the author furnishes the following on "The True Test:" "Where the parties to a contract in the form of a sale agree, expressly or by implication at the time it is made, that the contract is not to be enforced, that no delivery is to be made, but tho contract is to be settled by the payment of the difference. * * * Such a transaction is a wager." In an English case "the jury was told that if neither party intended to buy or sell, it was no bargain but a mere gambling transaction." The rule seems simple enough ,but in its application to transactions complicated by the incidents of boards of trade, "bucket shops," agents, brokers, and other commercial machinery, there has been considerable difficulty, and the cases are not in accord with each other, nor in all respects with the obvious general principle governing the subject.

The work before us is evidently the result of much research, and is well worthy of the consideration of all members of the profession whose line of practice includes commercial transactions of a speculative character.

A TREATISE on the Construction or Interpretation of Commercial and Trade Contracts. By Dwight Arven Jones, of the New York Bar. New York: Baker Voorhis & Co., Law Publishers, 66 Nassau Street, 1886.

This is another work on commercial law, but much broader in its scope than the preceding. That is confined to the law relating to certain morbid developments of commercial activity—this extends to the construction of commercial contracts generally, unaffected by any taint of illegality. At first it would ap

pear that the subject was too broad to be sufficiently treated in a single volume. It will be observed, however, that the author does not propose to treat the whole subject of the law of contracts, but only "to state simply and clearly the principles which govern the interpretation of all mercantile contracts." Even thus narrowed the subject is sufficiently broad for a single volume. The author has evidently bestowed much labor upon the preparation of this book, which is a very valuable addition to the legal literature of the law of contracts. The arrangement of the matter of the book is very good; the first chapter treats of the nature and scope of construction; the second, who construes the contract; the third, the law which governs the construction; the fourth, the law governing construction in special cases, such as commercial paper. The fifth, sixth, seventh, eighth, eleventh and twelfth chapters are devoted to questions as to admissibility and effect of parol evidence in aid of construction. The ninth and tenth chapters discuss the proof and effect of usage as affecting the interpretation. In the thirteenth, fourteenth and fifteenth chapters, the operation of parol evidence on construction is further discussed. The sixteenth, seventeenth and eighteenth chapters furnish rules for the construction of contracts generally, of the whole contract and of ambiguous contracts. The remaining five chapters are devoted to particular contracts, such as insurance policies, guaranties and the like, and to the effect of alterations of contracts, material or immaterial, by parties or by strangers, with the legal consequences of such alterations, as to presumptions and burden of proof.

The book is divided into sections, with an appropriate head note or catch-word to each, and this we consider a very commendable practice. Just here, however, we are constrained to "hint a fault." The sections are not, in our opinion, sufficiently numerous. If there were more of them, the references in the index might well have been to the sections instead of the pages, which we think the better plan. This, however, is quite a small matter. We regard the book, upon the whole, as very valuable, and cordially commend it to the profession.

JETSAM AND FLOTSAM.

AN ODD JUDGE.—When ignorance and oddity take a seat on the judicial bench, "the unskilful laugh," and "the judicious grieve." Lord Eskgrove, a Scotch judge knew little law and was garrulous in proclaiming his ignorance. When pronouncing sentence of death, he used to signalize himself by offering consolation to the prisoner in a style that shocked the bar and the spectators. His usual formula was:

"Whatever your releegious persuashon may be, prisoner, or even if, as I suppose, you be of no persuashon at all, there are plenty of reverend gentlemen who will be most happy for to shew you the way to yeternal life."

In those days Tory principles were in the ascendant, and Lord Eskgrove was a Tory of the Tories. A Whig was made to suffer severely if he came within reach of the arm of the court. Sir John Henderson, a zealous Scotch Whig, was once up for sentence before the full bench, for some offence the penalty of which was at the discretion of the court.

Lord Eskgrove, being deaf, gave his opinion in a low voice that the fine ought to be fifty pounds.

"I beg you to raise your voice," interrupted the imprudent Sir John; "if judges don't speak so as to be heard, they might as well not speak at all."

"What does the fellow say?" asked the nettled judge.

"He says that if you don't speak out, you may as well hold your tongue."

"Oh! My lords, what I was saying was very *simpall;* I was only *sayingg* that in my humble *opinyon,* this fine could not be less than two hundred and fifty pounds *sterlingg,*" roaring out the sum as loudly as his old cracked voice could shout.

The London Law Times, apropos of the Queen's Jubilee celebration by the Benchers of the Inner Temple on the 19th ult., "drops into poetry" after the following unique fashion:

A Royal Jubilee rarely occurs in this sublunal sphere,
And it's right that lawyers should welcome it when it really does appear;
So the Benchers of the Inner Temple, with the handsomest designs,
Got up their Hall, themselves, and Church, up to the very nines,
To celebrate the jubilee of our most gracious Queen—
Queen of England, Scotland, Wales, and of the Island green
(If Gladstone will of grace permit this loyal observation,
Which couples with the Saxon curs, the glorious Irish nation).

But how to celebrate this great event was the important question,
Without imposing too much work on anyone's digestion—
Without neglecting any art, good fun, or Christian duty,
Or subjecting to vulgar gaze the Benchers' daughters' beauty.

How easily the Benchers solved this very knotty problem,
And sugared plums for heavy swells with certainty to nobble 'em;
How in the early hours of night the guests were plied with farce—
The old familiar comedy of Bottom and the Ass;
How later on, when dreams had fixed their soft illusions firm on,
The company at midnight hour submitted to a sermon;
And after with philosophy proverbial as of Tupper,
And organ strains and handsome trains, returned to hall and supper:
All this is told in humble prose in newspapers most numerous,
With phrases which almost suggest a lurking spirit humorous.

This relieves us from a painful suspicion engendered by the "law poetry" which it has been our misfortune to encounter, that when Blackstone penned his farewell to his muse, that lady took him at his word, not only cut his acquaintance, but that of all his professional confreres,and that her "boycott" had descended even to this enlightened generation. [Ed. C. L. J.]